Supreme Court, U.S.
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No. 93 1978 JUN - 1 1994

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IN THE

Supreme Court of the United States

October Term, 1993

LIBERTY LAKE INVESTMENTS, INC.

Petitioner,

v.

HARRY F. MAGNUSON, et al.

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Of Counsel:

Jerry R. Neal
Preston Gates & Ellis
SeaFirst Financial Ctr
Spokane, WA 99201-0636

Susan L. Guthrie
Culp, Guterson & Grader
One Union Square
Seattle, WA 98101-3143

EARLE J. HEREFORD, JR.
27th Floor
One Union Square
600 University Street
Seattle, WA 98101-3143
(206) 624-7141

Counsel of Record and Attorney for Petitioner

June 2, 1994

eBCD Legal Printers, Seattle, WA

41 pp

QUESTIONS PRESENTED

1. Whether the presence of misrepresentations and ethical abuses deprives litigation of First Amendment immunity and brings it within the sham exception to the *Noerr-Pennington* doctrine? *See Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 113 S. Ct. 1920, 1929 n.6 (1993).

2. Whether it was error under *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 113 S. Ct. 1920, 1930 (1993), for the antitrust court to grant summary judgment dismissing a suit under Sherman Act § 1: (1) where the anticompetitive conduct in question included pursuit of putative "environmental" litigation in state court; (2) where the antitrust court held as a matter of law that the "environmental" litigation was brought with probable cause; but (3) where the state court — in reviewing the predicate facts of the underlying legal proceeding and dismissing the "environmental" suit on the merits — had previously held that

> [The evidence] is insufficient to allow any reasonable trier of fact to conclude that . . . [the environmental] concern is based on anything more than speculation or conjecture;

and

> [A] review of [the] evidence leads the court to the inescapable conclusion that the real issue is just what the rules exclude from environmental consideration: economic competition.

and; (4) where the suit which injured petitioner was one of three "environmental" lawsuits used to preclude market entry

of new shopping center competition by certain respondents (some of whom themselves lacked standing and were not named parties in the "environmental" suit).

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LIST OF PARTIES AND RULE 29.1 LIST

The Petitioner is Liberty Lake Investments, Inc. ("LLII"), and the Respondents are Harry F. Magnuson, University City, Inc., Orville Barnes, McCarthy Management and Development Co., Antone and Sundena Plese, Larry Lyden and West 514, Inc.

Petitioner LLII, a Washington corporation, is wholly owned by William E. Boeing, Jr.; John and David Fluke; Luke G. Williams, Jr.; and Donald Sherwood. LLII is not associated, as parent or subsidiary, with any publicly traded or privately held corporation.

IN THE
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OCTOBER TERM, 1993

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PETITION FOR WRIT OF CERTIORARI
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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit is reported at 12 F.3d 155 (1993) and is reprinted as Appendix A. The Order Granting Summary Judgment of the United States District Court for the Eastern District of Washington is not reported and is reprinted as Appendix B.

JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit was entered on December 16, 1993; LLII's timely petition for rehearing was denied on March 4, 1994.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution amend. 1, provides in pertinent part:

> Congress shall make no law . . . abridging . . . the right of the people . . . to petition the government for a redress of grievances.

The Sherman Act § 1, 15 U.S.C. § 1, provides in pertinent part:

> Every contract, combination in the form of trust . . . or conspiracy in restraint of trade . . . is hereby declared to be illegal . . . .

The Clayton Act § 4(a), 15 U.S.C. § 15(a), provides in pertinent part:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained . . . .

STATEMENT OF THE CASE

This case invokes the sham exception to the *Noerr-Pennington* doctrine.[1] It concerns the misuse of litigation by a shopping center owner and developer to preclude entry of new competition.[2]

A. Statement of Facts.

In 1976 the Wells B. McCurdy Trust, a predecessor to Liberty Lake Investments, Inc. ("LLII"), held property at Liberty Lake, Washington, intending to develop a major regional shopping center there. Liberty Lake is located on Interstate 90 in the Spokane valley, between Spokane, Washington, and Coeur d'Alene, Idaho. The trustee, Wells McCurdy, was an experienced shopping center developer and manager. The trust proceeded to develop the property into a regional mall site. Development steps included, among many other things, obtaining necessary permits and zoning, establishing utility service, obtaining a lease commitment from a major department store, the Bon Marche ("the Bon"), negotiating with other potential anchor tenants, applying for grading permits and designing the regional mall.

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[1] *Eastern R.R. President's Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972).

[2] A number of shopping center antitrust cases involving sham litigation have been reported. *See, e.g., Landmarks Holding Corp. v. Bermant*, 664 F.2d 891 (2d Cir. 1981); *Ernest W. Hahn, Inc. v. Codding*, 615 F.2d 830 (9th Cir. 1980); *Kravco Co. v. Valley Forge Center Assoc.*, 1992-1 Trade Cas. (CCH) ¶ 69863 (E.D. Pa. 1992); *Ross v. Bremer*, 1982-2 Trade Cas. (CCH) ¶ 64746 (W.D. Wash. 1982). In each of these cases, the lower court rejected summary disposition of the action.

LLII was formed in December 1986 by several of the trust beneficiaries (William E. Boeing, Jr., John and David Fluke, Luke Williams and Donald E. Sherwood), and it acquired the Liberty Lake site from the trust on July 10, 1987, after the respondents' actions caused the financial collapse of the trust. The trust assigned all of its rights in the property and choses in action to LLII.

University City, Inc. is a Washington corporation which owns the University City shopping center in Spokane. By 1980, University City had announced plans to renovate and expand its existing University City shopping center. University City also had acquired (by 1984) a site in Coeur d'Alene, Idaho (which is on Interstate 90), on which it hoped to develop a regional shopping mall. Both University City properties would have competed directly with the proposed Liberty Lake mall. Harry F. Magnuson is an officer and substantial shareholder of University City, Inc. McCarthy Management & Development Co. manages the University City shopping center, as well as several other shopping centers in the Spokane area. Orville Barnes is the president of McCarthy Management, and is also an officer of University City. Antone and Sundena Plese are former shareholders of University City, and Antone Plese was an officer.

When the trust began development of the Liberty Lake site, Magnuson, fearing the effect a mall at Liberty Lake would have on University City, on the proposed University City expansion, and on the Coeur d'Alene project, tried to persuade major tenants not to go to Liberty Lake, but rather to locate or stay at University City or locate at Coeur d'Alene. Nevertheless, development of the Liberty Lake site proceeded, and on September 29, 1986, the trust and the Cafaro Company, of Youngstown, Ohio, one of the leading and most fiscally sound shopping mall development

companies in the United States, entered into an agreement to develop the Liberty Lake mall.[3]

On January 8, 1987, after a public hearing, the Spokane County Hearing Examiner Committee approved the site plan for the project. No person or organization with expertise opposed the site plan approval.[4] On January 19, 1987, the last day possible to do so, Magnuson and Barnes — not having the credibility or standing required to bring the suit themselves — caused the commencement of "environmental" litigation (the "*West 514*" suit).[5] The litigation challenged the environmental impact statement for the project under the Washington State Environmental Policy Act ("SEPA").[6] The *West 514* suit, through its pendency alone, successfully blocked development of the Liberty Lake mall.

By recruiting straw parties to file suit (Darlene Compton and Larry Lyden, who joined the Pleses as plaintiffs), by paying all legal costs and fees, and by managing

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[3]Under the agreement, Cafaro was to pay $10 million to LLII. Cafaro would take title to the Liberty Lake mall site and Cafaro and LLII would jointly own the land adjoining the shopping center site, the value of which would be enhanced by its proximity to a major regional shopping center. Later discussions between LLII and Cafaro addressed equity participation by LLII in the center.

[4]To the contrary, petitions containing some 22,000 signatures were submitted by citizens supporting the Liberty Lake mall project. These consumers perceived the mall as beneficial, and viewed the obstruction of it as injurious to their welfare.

[5]*West 514, et al. v. County of Spokane*, No. 87-2-01106-7 (filed April 9, 1987), *aff'd on appeal*, 53 Wn. App. 838, 770 P.2d 1065, *rev. denied*, 113 Wn.2d 1005, 777 P.2d 1050 (1989).

[6]Wash. Rev. Code Ch. 43.21C (1983).

and controlling the litigation to suit their goals, Magnuson and Barnes were able to tie up the project, prevent Cafaro from closing on the purchase and sale agreement, and delay construction to the point that anchor tenants abandoned their commitments to the Liberty Lake mall.

The commencement of *West 514* meant that approval of the project was not final. Despite the obvious weakness of the environmental challenge, Cafaro was not willing to close on the agreement until final approval was obtained. Moreover, until government approval was final, construction on the site could not begin. The delay in construction caused by the pendency of the litigation, and the uncertainty as to when final approval would be obtained, made prospective tenants hesitant, and eventually led the Bon to terminate its commitment to the Liberty Lake mall. These factors — all of them a direct result of the *West 514* litigation — led to the demise of the Liberty Lake mall.

The anticompetitive purpose of the *West 514* suit and Harry Magnuson's intention to block the Liberty Lake mall are well documented in the record. The *West 514* litigation had nothing whatsoever to do with environmental concerns; it was, from inception, simply a powerful weapon to accomplish respondents' desires to (in their own words) "stifle," "sidetrack," "shut down," "stop" and "head off" development of the Liberty Lake mall.

Efforts to stir up the *West 514* suit against Liberty Lake mall were undertaken by Harry Magnuson himself, who placed telephone calls, at a minimum, to R. A. Hanson (another shopping center developer, and a direct competitor of Magnuson's), and Basil Vyzis (another developer and at that time a co-owner of Frederick & Nelson and the Crescent, two major department stores).

According to R. A. Hanson, Mr. Magnuson asked Mr. Hanson for his support in the effort to stop Liberty Lake:

> Harry Magnuson called me up one day and asked me to join him in this effort, and I about fell out of my chair[.] . . .
>
> [H]e made some remarks like — well, he asked me very pointedly to join him, help him in this effort . . . but he also made some comments about, "Well, I realize that we're competitors in one place, but we're together on this," trying to talk me into it. . . .
>
> He said, "We have to stop this thing." . . .
>
> *[H]e was going to get somebody to see somebody who had standing to make this appeal. . . .*
>
> *I understand that through the appeal and legal processes, you can, you know, greatly delay something. "Stop" is probably not accurate; someday you can effectively stop something if you can delay it long enough.*

(Emphasis added.) Magnuson also telephoned Basil Vyzis, apparently for the same purpose. A message slip produced by Vyzis reads in part: "Harry Magnuson — Liberty Lake Shopping — Planning and Zoning Approved — Jan. 8th — Mon. [January 19, 1987] last day to appeal — trying to find someone to file the appeal."

At the same time, Orville Barnes was hurriedly trying to find straw-parties with standing to appeal. He approached

two individuals with whom he had business relationships — Darlene Compton and Larry Lyden — and convinced them to act as plaintiffs in the litigation. Darlene Compton was approached by Barnes to oppose Liberty Lake because, as Barnes told her: "'[W]e' need somebody who owns property downtown." Barnes convinced Compton that Liberty Lake mall would mean financial disaster for her. Lyden was the owner and tender of a bar (located in Compton's building) in which Orville Barnes had had a financial interest. Barnes promised Compton and Lyden that all of their legal fees and expenses would be taken care of, if they would sue LLII. Compton, Lyden (through West 514) and Antone and Sundena Plese, who were University City stockholders, became the plaintiffs in the *West 514* litigation.

Once Magnuson and Barnes had their straw-parties in place, the prosecution of *West 514* was turned over to University City's lawyers, who acted under the immediate direction primarily of Orville Barnes. (University City's lawyers are associated with the firm in which Harry Magnuson's brother, Robert Magnuson, is a senior partner.) The individual attorneys responsible for the case were paid by University City. Randall Gaylord, who did most of the day-to-day work on the *West 514* suit, was a first-year associate. Very early on he apparently had no knowledge that University City was funding the litigation; in fact, he had been told by partners in his firm that *West 514* was a *pro bono* case.

The *West 514* litigation actually began with the filing of an appeal of the Hearing Examiner's decision to the Spokane County Board of Commissioners. The Board denied the appeal, issuing its findings and conclusions on March 10, 1987. The Board's decision was appealed to the Spokane County Superior Court, and eventually litigated through the

full appellate process; the *West 514* suit did not end until June 1989. It was everywhere unsuccessful on the merits.[7]

The state trial judge who decided the *West 514* suit made express findings that the issues behind the *West 514* suit were not within the ambit of the SEPA statute, and were excluded from consideration under the SEPA regulations.

In his March 7, 1988 opinion on the merits of *West 514*, Spokane County Superior Court Judge Michael E. Donohue affirmed approval of the Liberty Lake mall. This decision was based upon a full review of the certified record of proceedings before the Board of County Commissioners, a record which had not been before him when he rendered his standing decision.[8] Judge Donohue held that the

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[7]Although the superior court made an initial determination that the *West 514* plaintiffs had standing under SEPA, it later concluded that even the *purported* interests at stake (i.e., Compton's, Lyden's and the Pleses') were economic, not environmental. (At the time the superior court determined that the *West 514* plaintiffs appeared to have had standing — thereby allowing the case to proceed — it had not been advised that one of the plaintiffs had asked to withdraw from the case; nor did it know that the real parties behind the lawsuit, who had no standing to bring *West 514*, were simply seeking to block entry of new competition through the pendency of the suit.)

[8]In deciding the issue of standing on June 3, 1987, Judge Donohue determined only that a writ should issue under Wash. Rev. Code Ch. 7.16 *et seq.*, based on bare allegations which he later determined had not been substantiated. In other words, Judge Donohue decided nothing more than that the pleadings and affidavits facially appeared to entitle the petitioners to have the court decide the merits of the dispute. *Warth v. Seldin*, 422 U.S. 490, 498 (1975); *Freedom From Religion Foundation, Inc. v. Zielke*, 845 F.2d 1463, 1467 (7th Cir. 1988). The affidavits later proved to be deceptive. One had been submitted for Darlene Compton, who already had advised her counsel that she no longer wished to be a party to the suit. Another affidavit, that of Dr. Larry Esvelt, stated that the Liberty Lake mall project "will" contaminate the Spokane aquifer.

petitioners' environmental claims were a pretext asserted to protect their economic interests:

> WAC 197-11-449(3) exempts "economic competition" and "profits" issues from the areas to be addressed in environmental impact statements. The legislature has restricted the use of SEPA to "natural" or "built" elements of the environment. RCW 43.21C.110(f). From the materials provided, it is clear that the intent of the legislature was to leave no doubt that concerns such as business competition or potential consumer flight from one commercial center to another was not an environmental consideration under SEPA.
>
> The body of material before the Board pertaining to the issue of economic blight is insufficient to allow *any reasonable trier of fact* to conclude that such a concern is based on anything more than speculation or conjecture. *Moreover, a review of that evidence leads the court to the inescapable conclusion that the real issue is just what the rules exclude from environmental consideration: economic competition.*

The court stated further that the "environmental" evidence was unpersuasive and speculative and fell "far short of scientific probability or likelihood". In its affirmance, the Washington Court of Appeals wrote:

Later, however, after reviewing the certified record, Judge Donohue found that Dr. Esvelt's actual opinion was speculation and fell far short of the degree of certainty necessary to require the preparation of a Supplemental Environmental Impact Statement.

> There is no doubt that a large mall in the Liberty Lake area will compete economically with downtown Spokane as well as other area retail centers. *But economic competition, in and of itself, is not an environmental effect and need not be discussed in an EIS. WAC 197-11-448(3).*

The Washington Supreme Court thereafter denied review. 113 Wn.2d 1005, 777, P.2d 1050 (1989). Clearly the state courts found *West 514's* environmental concerns baseless.

University City, Magnuson and Barnes and their counsel ensured that the *West 514* litigation — despite having no basis in fact or law — continued for some 2½ years.

The parties behind *West 514* protracted it by prosecuting the case in the name of an unwilling litigant. Not long after *West 514* had commenced, Darlene Compton learned that the real parties in interest behind the suit were concerned only with protecting their financial well-being, and promptly requested that her name be removed from the lawsuit. Compton made repeated attempts to get out. In her first letter, dated May 8, 1987 — before Judge Donohue decided the standing issue — she told Randy Gaylord that the use of her name on the lawsuit was "neither appropriate nor desirous," and noted that the case appeared to be about "Orville [and] his competitors." Despite her demand to be extricated from it, her name continued to be used in the lawsuit; and Compton made further requests to withdraw. Instead of acting on Compton's request, Gaylord merely forwarded her letters to his superiors. Ultimately Compton met with the University City lawyers; she was pressured by them to stay in; but she did not yield to this pressure and maintained her desire for withdrawal. Finally, Compton received a telephone call from Orville Barnes, who told her

that her name, once on the suit, could not be removed. *West 514* was prosecuted to conclusion using her name.

The parties behind the *West 514* litigation also protracted it by refusing to settle for anything other than protection of Magnuson's shopping center interests. This is reflected in the nature of the few settlement efforts which took place. Certain negotiations (which had absolutely nothing to do with the environment) were conducted between Cafaro and Harry Magnuson. Magnuson was negotiating either to become a part owner of any completed Liberty Lake mall, or to involve Cafaro in Magnuson's projects, or both. In exchange for a "piece of the action" for Magnuson, the *West 514* lawsuit would be dropped. Compton and Lyden, who were *parties* to *West 514*, were not informed by their counsel that these talks were taking place.[9] Nor were two genuine settlement overtures, which had been made by counsel for LLII and Cafaro, ever communicated to Compton or Lyden.

Preventing the development of proposed shopping centers through the use of environmental litigation brought in the name of straw parties was nothing new to the University City interests:

(1) Beginning in 1978, University City blocked one Spokane valley mall project (proposed by James S. Black & Co.) by paying legal and expert witness fees, thereby converting neighborhood concern about minor issues into a three-year-long lawsuit entitled *Riegel v. County of Spokane*, 31 Wn. App. 1038 (1982) ("*Riegel*") (filed February 9, 1979). A law clerk's memo to William Goss,

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[9]Lyden, in fact, met with his attorney, Randy Gaylord, exactly one time — to get the suit started — during the entire pendency of the lawsuit.

the attorney for the *Riegel* plaintiffs, shows that delay and stifling of competition were the point of the *Riegel* suit.

> Can we make some sort of argument that the issues to be decided in . . . [another case pending in Spokane County] will have an effect on the resolution of our [*Riegel*] case, and that therefore our case should be continued until the court reaches a decision? *If this is plausible, it would create further delay in our action.*

(Emphasis added.)

(2) In 1980, when University City had stirred up opposition to block another mall project proposed by R. A. Hanson, Hanson filed a retaliatory lawsuit (attacking a proposed University City expansion project). This litigation was settled in 1981 by mutual agreement containing promises not to obstruct one another's projects through misuse of governmental processes and litigation. This settlement agreement was breached by University City, which — beginning in 1985 — secretly stirred up further opposition against Hanson's efforts and funded the two-year-long lawsuit entitled *Crossman v. County of Spokane*, No. 86-2-01407-6 (filed April 24, 1986) ("*Crossman*").

In the 1981 settlement agreement between University City and Hanson, following University City's early efforts to block Hanson's project, Harry Magnuson (who signed the confidential settlement agreement) admitted that:

> University City, Inc. is opposing the development of Sullivan Mall and has proposed to continue to oppose said Sullivan Mall through various administrative and judicial processes.

The agreement also recognized that:

> Continued opposition by these parties to the respective University City and Sullivan Mall projects substantially diminishes the likelihood that either project will be successfully completed except at a very great cost to the prospective parties.

As part of the agreement, University City promised to stop opposing Hanson's project. Nevertheless, the *Crossman* suit was maintained in violation of the Magnuson-Hanson settlement agreement.

Evidence that the purpose of the protracted *Crossman* litigation was not to voice environmental concerns but rather to kill the Hanson project is seen in a letter from Tom May (the attorney paid by University City to represent the *Crossman* plaintiffs) to Everett Coulter (a conduit for the payment by University City of May's fees):

> [Plaintiffs'] interests, at least in part, reflect the interests of your client [University City]. These interests are best described in a single phrase: "*To completely stop the project and to preserve the area for all time.*" . . .
>
> Thus there is a potential for maintaining the cloud of litigation for a very long period of time. A decision whether to do so remains with the client, and we certainly solicit your client's input in that regard. . . .
>
> Record review cases, such as Sullivan Park, sorely challenge the abilities of plaintiffs' attorneys. Does your client consider a

> delay of two to four years a victory? If so, I am confident of a victory. . . . Even a loss on the merits, having occupied two or more years, may be a victory.

The merits of the *Crossman* litigation were entirely beside the point to University City. The suit was brought to stifle competition. Victory through delay — "maintaining the cloud of litigation for a very long period of time" — not victory on the merits, was the object of the *Crossman* suit.

(3) In 1980-81, Magnuson and Barnes planned to mount opposition to block commercial development by R.A. Hanson of a 22-acre parcel of land in Coeur d'Alene (efforts which were abandoned when Hanson did not develop the site). In 1980, R. A. Hanson acquired the 22 acres in Coeur d'Alene, Idaho, with a view towards developing a shopping center there. Magnuson told Barnes to look into stopping that project through sham opposition:

> This also brings to mind as to what we should be doing in Coeur d'Alene to monitor the local city situation, the legal situation, and the environmental situation with regard to Hanson's proposed development. We should do something here similar to what we are doing in the Spokane Valley.

What Magnuson was then "doing in the Spokane Valley" was funding the *Riegel* suit, and fostering opposition to the Hanson Spokane valley project.

(4) In the mid-1980s, to protect University City's proposed Coeur d'Alene mall, Magnuson delayed development of the Silver Lake Mall in Coeur d'Alene, by making misrepresentations to federal agencies responsible for funding

the EDA grants which were a necessary prerequisite for construction of utilities to serve the mall site.

B. Prior Proceedings.

This antitrust case was filed on December 29, 1989. On June 29, 1990, the district court denied respondents' motion to dismiss the complaint on several grounds, including *Noerr-Pennington*.

Respondents served and filed motions for summary judgment on June 12, 1991, raising, among others, issues of *Noerr-Pennington* immunity. The summary judgment motions were briefed and set for argument on December 20, 1991, over LLII's objection that respondents had not complied with outstanding discovery orders, document discovery was not complete and key depositions — including Harry Magnuson's — had not been taken. On March 10, 1992, the district court entered summary judgment of dismissal.

LLII timely appealed. The United States Court of Appeals for the Ninth Circuit affirmed the District Court's summary judgment of dismissal on December 16, 1993. LLII timely petitioned for rehearing on December 29, 1993; and its petition was denied on March 4, 1994.

REASONS FOR GRANTING THE WRIT

Noerr-Pennington does not immunize sham lawsuits which seek only to make use of litigation's destructive side effects and are "a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor. . . ." *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 380 (1991), quoting *Noerr*, 365 U.S. at 144. The sham

exception "encompasses situations in which persons use the government *process* — as opposed to the *outcome* of that process — as an anticompetitive weapon." 499 U.S. at 380.[10]

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[10]Leading commentators and jurists have recognized that sham litigation is a powerful anticompetitive weapon. Judge Bork has observed that:

> The predator need not expect to defeat entry all together. He may hope only to delay it. Sham litigation then becomes a useful tactic . . . for it may be worth the price of litigation to purchase a delay of a year or several years in a rival's entry into a lucrative market. . . .

Robert Bork, *The Antitrust Paradox* at 348 (1978).

In *Premier Elec. Const. Co. v. N.E.C.A., Inc.*, 814 F.2d 358 (7th Cir. 1987), Judge Easterbrook described sham petitioning:

> If the injury is caused by persuading the government, then the antitrust laws do not apply to . . . the persuasion (*Noerr-Pennington*). *If the injury flows directly from the "petitioning" — if the injury occurs no matter how the government responds to the request for aid — then we have an antitrust case. When private parties help themselves to a reduction in competition, the antitrust laws apply.*

Id. at 376 (emphasis added).

In *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 694 F.2d 466 (7th Cir. 1982), *cert. denied*, 461 U.S. 958 (1983), Judge Posner did the same.

> [I]f the improper purpose is to use litigation as a tool for suppressing competition in its antitrust sense, . . . it becomes a matter of antitrust concern. This is not to say that litigation is actionable under the antitrust laws merely because the plaintiff is trying to get a monopoly. He is entitled to pursue such a goal through lawful

This petition raises two unresolved questions about sham litigation law which should be settled by this Court. Both questions arise from the opinion in *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 113 S. Ct. 1920 (1993).

The first question — whether misrepresentations and ethical abuses deprive litigation of *Noerr-Pennington* immunity — was expressly left open by this Court in *Columbia Pictures*:

> We need not decide here whether and, if so, to what extent *Noerr* permits the imposition of antitrust liability for a litigant's fraud or other misrepresentations.

113 S. Ct. 1920, 1929 n.6.

> means, including litigation against competitors. *The line is crossed when his purpose is not to win a favorable judgment against a competitor but to harass him, and deter others, by the process itself — regardless of outcome — of litigating.*

Id. at 472 (emphasis added).

The District court below, during the course of this very case, commented that *environmental* litigation used by a skillful lawyer, can frustrate almost anything.

> I've said for years that a skillful lawyer, trained in environmental law could frustrate almost anything.

CR 468 at 85.

The second question arises from this Court's observation in *Columbia Pictures* that the antitrust court "may decide probable cause as a matter of law" when "there is no dispute over the predicate facts of the underlying legal proceeding." 113 S. Ct. 1920, 1930. The second question asks whether it is appropriate to apply that rule to this factually complex record.

Abuses and Misrepresentations.

It has long been thought that misrepresentations and abuses, although tolerated in the political arena, are improper in judicial or quasi-judicial proceedings and do not enjoy First Amendment protection. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972); *St. Joseph's Hosp. v. Hospital Corp. of America*, 795 F.2d 948, 955, *reh. denied*, 801 F.2d 404 (11th Cir. 1986); *Clipper Exxpress v. Rocky Mt. Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1260-1263 (9th Cir. 1982), *cert. denied*, 459 U.S. 1227 (1983); *TRW Financial Systems, Inc. v. Unisys Corp.*, 835 F. Supp. 994, 1013 (E.D. Mich. 1993). Federal antitrust practitioners need to know whether this aspect of the sham exception to *Noerr-Pennington* remains good law.

This case presents a factual context in which this issue may be resolved. *West 514* involved serious misrepresentations and ethical abuses in the judicial process.[11] The

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[11]Earlier decisions, including other shopping center cases, have found abuses like those present here unworthy of First Amendment protection.

> The most serious allegations by the plaintiffs involve evidence that defendants engaged in a concerted program to solicit "straw parties" to act as plaintiffs in actions where defendants had no standing. They offered total financing and hold-harmless agreements as inducements and completely financed and controlled the

West 514 proceeding was itself a misrepresentation perpetrated by University, Magnuson and Barnes: (1) It was not in fact an environmental suit; its actual concerns fell outside the reach of the SEPA statute and regulations it purported to invoke. *West 514* was about economic competition. Its alleged environmental concerns were unsupported by credible evidence, and it was conceived, initiated, and funded in secret (Compton was told the case was being handled *pro bono*), solely to protect the University City interests from new shopping center competition. (2) It was prosecuted in the name of an unwilling litigant. Compton repeatedly informed her counsel that she wished to withdraw from the *West 514* litigation, and did so before the standing question was briefed and decided. Her requests were ignored, and

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> litigation. They directed the litigation in secret, refusing to reveal their role even under court order. They expressly misrepresented to state courts who the real parties in interest were. They named as plaintiffs people who, not only had no interest in the litigation, but who did not want to participate. At least one couple specifically told defendants they did not want their names used, but later read in a newspaper that they had been named as plaintiffs. This couple contacted the defendants to demand that their names be removed, but defendants continued to use the names, even throughout the appeal.

Ross v. Bremer, 1982-2 Trade Cas. at 71618. *Transkentucky Transportation R.R. v. Louisville R.R. Co.*, 581 F. Supp. 759, 770 (E.D. Ky. 1983) ("the commission of fraud and the knowing submission of false information do not enjoy immunity under the *Noerr* doctrine" where those actions "subverted the integrity of the governmental process"); *Israel v. Baxter Laboratories, Inc.*, 465 F.2d 272, 278 (D.C. Cir. 1972) ("the basic concern of the courts . . . may be deemed the integrity of the regulatory process. No actions which impair the fair and impartial functioning of an administrative agency should be able to hide behind the cloak of an antitrust exemption").

Orville Barnes falsely told her that her name, once on, could not be taken off the suit.

Consistent with earlier precedent, the Ninth Circuit opinion in *Columbia Pictures* acknowledged that different considerations would be relevant, and that even successful litigation (*West 514* was not) could be sham, where misrepresentation and abuse of the adjudicatory processes are present. *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 944 F.2d, 1525, 1531 n.7 (9th Cir. 1991), *aff'd*, 113 S. Ct. 1920 (1993). Such is the case here. The *West 514* lawsuit involved serious misrepresentations to the Spokane County Superior Court. The straw plaintiffs in the *West 514* litigation (Larry Lyden and Darlene Compton) were not the real parties behind the suit, and were before the court only to paper over standing problems and hide the involvement of the University City interests. The *West 514* litigation, which purported to concern substantial environmental issues addressed by SEPA, in fact did not. And the *West 514* litigation was maintained for years in Darlene Compton's name, despite her express direction to the contrary.

To summarize: The *West 514* suit involved the following abuses: (1) *West 514* plaintiffs Darlene Compton and Larry Lyden were solicited by Orville Barnes to oppose the Liberty Lake shopping center; (2) to persuade them to sue, Barnes misrepresented to Compton and Lyden that disaster would strike their own downtown properties if they did not sue; (3) Lyden and Compton did not pay anything for their participation in the lawsuit; (4) Compton's name was used in the lawsuit against her will, and her efforts to remove her name from the lawsuit were thwarted in an unethical fashion by her counsel; (5) Compton's efforts to remove her name from the lawsuit were wrongly rejected by Barnes, who misrepresented to her the fact that she could not have her

name removed; (6) at least two overtures to settle the *West 514* case were made by LLII's and Cafaro's counsel and those settlement overtures were not communicated by counsel to Compton or Lyden; (7) the one settlement discussion which did occur did not involve Compton, Lyden or Gaylord and turned only on Harry Magnuson's hope for a "piece of the action" at Liberty Lake; (8) counsel, in violation of the ethical rules, permitted the parties funding the litigation to actually control it; and (9) counsel undertook dual representation of the sham plaintiffs and Harry Magnuson, Orville Barnes and University City when there were patent conflicts of interest in doing so.

This Court should grant LLII's petition, take the opportunity presented here to address the question left open in *Columbia Pictures*, and hold that the misrepresentations and other abuses associated with the *West 514* suit strip the respondents of any *Noerr-Pennington* protection.

Baselessness.

The Supreme Court should also grant this petition because this case presents an opportunity to decide whether an antitrust court can or should decide *Noerr-Pennington* immunity as a matter of law on the facts of record here. The facts of this case are far more complex and revealing of anti-competitive motive and conduct than those raised by the antitrust counterclaims in *Columbia Pictures*. The rule in *Columbia Pictures* does not do justice to the actions of Harry Magnuson which halted the Liberty Lake mall development. This case deserves a careful look through the lens of this Court's extensive sham exception precedent predating and including *Columbia Pictures*. As Justice Stevens noted, about the new absolute rule announced in *Columbia Pictures*:

> Even in this Court, more complicated cases, in which, for example, the alleged competitive injury has involved something more than the threat of an adverse outcome in a single lawsuit, have produced less definite rules. . . . In such a case, a rule that a single meritorious action can never constitute a sham cannot be dispositive. Moreover, a simple rule may be hard to apply when there is evidence that the judicial process has been used as part of a larger program to control a market . . . without any interest in the outcome of the lawsuit itself. . . . It is in more complex cases that courts have required a more sophisticated analysis--one going beyond a mere evaluation of the merits of a single claim.

113 S. Ct. at 1934-35.

The district court's finding — utilizing *Columbia Pictures* — that *West 514* was automatically protected conduct because brought with probable cause overlooked two important points: *(1) The key figures in this case had no standing to pursue the underlying state litigation and did not, in fact, appear as "petitioning" parties. (2) The state trial court found the underlying suit factually insupportable and beyond the scope of the SEPA statute invoked.*

First, the University City interests had no standing to bring the *West 514* suit.[12] Indeed, Magnuson, Barnes,

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[12] *United States v. S.C.R.A.P.*, 412 U.S. 669 (1973); *Eastlake Com. Co. v. Roanoke Assoc., Inc.*, 82 Wn.2d 475, 488 n.5, 513 P.2d 36 (1973); *Concerned Olympia Residents v. City of Olympia*, 33 Wn. App. 677, 682, 684, 657 P.2d 790 (1983). *Accord, Utility Reform Project v.*

University City and McCarthy were not parties to the *West 514* suit. *Noerr-Pennington* protection does not extend to persons who, without the right to petition the courts themselves, seek to injure competition by soliciting and funding the lawsuits of others. Phillip Areeda and Herbert Hovenkamp, *Antitrust Law* ¶ 203.1f at 33 (1993 Supp.). "A suit by one lacking standing is 'without merit' in the same way as a suit that has no basis in the substantive law." *Id.* *Accord*, *In re Burlington Northern Inc.*, 822 F.2d 518, 530-32 (5th Cir. 1987), *cert. denied*, 484 U.S. 1007 (1988).

If the University City interests, especially Harry Magnuson, had commenced the *West 514* litigation as a named party, this suit would have readily been perceived as baseless for want of standing. This fact denies them *Noerr-Pennington* protection.

> If the litigant knows or reasonably should have known that it lacked standing, its litigation loses *Noerr*'s protection, even though its co-plaintiffs' claims subsequently prove meritorious.

Antitrust Law ¶ 203.1f at 33. *Accord*, *Landmarks Holding*, 664 F.2d at 896 (opponents who appealed zoning decisions knowing they had no standing not protected by *Noerr-Pennington*); *In re Burlington*, 822 F.2d at 532:

B.P.A., 869 F.2d 437, 447 (9th Cir. 1989); *Coughlin v. Seattle School Dist.*, 27 Wn. App. 888, 894, 621 P.2d 183 (1980). *See also Warth v. Seldin*, 422 U.S. 490, 499 (1975). The University City interests knew they lacked standing when the *West 514* case was filed. Harry Magnuson was a long-time Idaho resident; the Liberty Lake site is in Washington. Further, the University City interests knew they didn't have such standing because they had researched and briefed the issue themselves in 1980 in connection with the Hanson litigation to which University City and Magnuson were parties.

> [T]he interests supporting application of the antitrust laws to prohibit and penalize anti-competitive conduct are sufficiently strong to dispel any constitutional difficulties in withholding *Noerr-Pennington* protection from persons who, without the right to petition the courts directly, seek to further their anticompetitive goals through funding, encouraging, and assisting the lawsuits of others.

Id.

Second, the state trial court expressly held *West 514* was baseless because it was unsupported by credible evidence (evidentiary materials insufficient to allow any reasonable trier of fact to conclude concerns were more than speculation or conjecture) and not well-founded under Washington environmental law (real issue just what rules exclude from environmental consideration: economic competition). In its decision in *Columbia Pictures*, this Court stated a case was not baseless if a reasonable litigant could reasonably expect success on the merits. The parties behind the *West 514* suit fail this test. No one could reasonably expect success on the merits of a lawsuit they had no standing to bring, whose subject matter is not within the coverage of the statute invoked, and whose factual predicate is unsupported by evidence.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that a writ of certiorari be granted.

DATED: June 2, 1994.

Of Counsel:

Jerry R. Neal
Preston Gates & Ellis
SeaFirst Financial Center
Spokane, WA 99201-0636

Susan L. Guthrie
Culp, Guterson & Grader
One Union Square
Seattle, WA 98101-3143

EARLE J. HEREFORD, JR.
27th Floor
One Union Square
600 University Street
Seattle, WA 98101-3143
(206) 624-7141

Counsel of Record and Attorney for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 92-35300

OPINION

LIBERTY LAKE INVESTMENTS, INC.

Appellant,

v.

HARRY F. MAGNUSON, et al.

Appellees.

Appeal from the United States District Court
for the Eastern District of Washington
Robert J. McNichols, Chief Judge

Argued and Submitted
November 2, 1993 - Seattle, Washington

Filed December 16, 1993

Before: Tang, Farris & Rymer,
United States Circuit Judges

SUMMARY

Developer of property brought action against owners of competing businesses claiming violation of antitrust laws. The United States District Court for the Eastern District of Washington, Robert J. McNichols, Chief Judge, granted summary judgment for competitors, and developer appealed. The Court of Appeals, Rymer, Circuit Judge, held that evidence did not establish that prior environmental litigation undertaken by competitors was sham litigation so as to deprive them of immunity from liability under the antitrust laws on the basis of that litigation.

Affirmed.

COUNSEL

Earle J. Hereford, Jr., Culp, Guterson & Grader, Seattle, WA, for plaintiff-appellant.

Leslie R. Weatherhead, Witherspoon, Kelley, Davenport & Toole, Spokane, WA, for defendants-appellees.

Appeal from the United States District Court for the Eastern District of Washington.

Before: TANG, FARRIS, and RYMER, Circuit Judges.

OPINION

RYMER, Circuit Judge:

Liberty Lake Investments, Inc. owned property on Interstate 90 between Spokane, Washington and Coeur d'Alene, Idaho, which it wished to sell to a developer for construction of a regional shopping center. It encountered various difficulties, such as signing up sufficient tenants satisfactory to the prospective anchor tenant, the Bon Marche (the Bon); negotiating a deal with the Washington Department of Transportation for improved access to the shopping center; and fighting a challenge by Spokane shopping center interests to permits for Liberty Lake.

This antitrust action primarily has to do with a last-minute appeal to the Spokane Board of County Commissioners (Board), claiming that the County Hearing Examiner Committee erred in granting Liberty Lake a permit without a new Environmental Impact Statement (EIS), and litigation in the Washington state courts alleging that the Liberty Lake zoning plan violated Washington's Environmental Policy Act (jointly, *West 514* litigation). Both proceedings were brought by West 514, Inc., which operates a tavern in downtown Spokane, and other individuals who do business in Spokane, but they were prompted and paid for by Harry F. Magnuson, the major shareholder of University City, Inc., which owns a number of shopping centers, University City, and McCarthy Management and Development Company, which manages University City's Spokane shopping center (collectively, Magnuson).

The complaint alleges that these parties conspired to mount a frivolous environmental challenge to Liberty Lake's plan to develop its tract of land for sale as a

regional shopping center. On the grounds that Liberty Lake lacked antitrust standing, and that the *West 514* litigation was not sham and defendants' conduct was therefore immune from antitrust liability under the *Noerr-Pennington* doctrine, the district court granted summary judgment in favor of defendants. Liberty Lake appeals both rulings, and also argues that the district court erred in deciding the summary judgment motion while it was conducting discovery essential to opposing that motion. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

I

We review de novo the district court's grant of summary judgment. *Kruso v. International Tel. & Tel. Corp.*, 872 F.2d 1416, 1421 (9th Cir. 1989), *cert. denied*, 496 U.S. 937, 110 S. Ct. 3217, 110 L. Ed. 2d 664 (1990); *State Farm Fire & Casualty Co. v. Martin*, 872 F.2d 319, 320 (9th Cir. 1989). We must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Tzung v. State Farm Fire & Casualty Co.*, 873 F.2d 1338, 1339-40 (9th Cir. 1989); *Judie v. Hamilton*, 872 F.2d 919, 920 (9th Cir. 1989).

II

Liberty Lake first argues that the district court incorrectly held that it lacks antitrust standing to pursue this action. We do not resolve this issue because even if Liberty Lake does have antitrust standing, it cannot meet the test set out in *Professional Real Estate Investors, Inc. v, Columbia Pictures Industries, Inc.*, ___ U.S. ___, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993), for the sham

exception to the *Noerr-Pennington* doctrine. *See Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 144, 81 S. Ct. 523, 533, 5 L. Ed. 2d 464 (1961) (there may be situations where campaign ostensibly directed toward influencing governmental action is a mere sham to cover attempt to interfere directly with the business relationships of a competitor).

A

Relying on our opinion in *Columbia Pictures Industries, Inc. v. Professional Real Estate Investors, Inc.*, 944 F.2d 1525 (9th Cir. 1991), the district court held that in order to support a finding of sham, an antitrust plaintiff must show that a lawsuit is baseless and that the suit was brought as part of an anticompetitive plan external to the underlying litigation. *Id.* at 1532. Applying this test, the district court held, as a matter of law, that the *West 514* litigation was not baseless.

Since the district court's decision in this case, the Supreme Court has affirmed our decision in *Columbia Pictures* and adopted a similar, two-part test for the sham litigation exception to *Noerr-Pennington:*

> First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under *Noerr,* and an antitrust claim premised on the sham exception must fail. Only if the challenged litigation is objectively meritless may a court examine the litigant's subjective motivation.

> Under this second part of our definition of sham, the court should focus on whether the baseless lawsuit conceals an attempt to interfere *directly* with the business relationships of a competitor, through the use of the governmental *process* — as opposed to the *outcome* of that process — as an anticompetitive weapon.

Professional Real Estate Investors, ___ U.S. at ___, 113 S. Ct. at 1928 (footnote, citations, and quotation marks omitted).

[1] Liberty Lake argues that the *West 514* litigation was objectively baseless for several reasons. First, it says that the *West 514* plaintiffs lacked standing because the injury at stake was to competitive economic interests, not to the environment. We cannot agree, however, that the *West 514* plaintiffs lacked an objectively reasonable basis for believing they had standing; indeed, the Washington superior court *held* they had standing under the State Environmental Protection Act (SEPA) when it issued a writ of review. That the Washington courts later found that the *West 514* plaintiffs failed to establish an injury to Spokane's water supply goes to the merits, not to whether they were threatened with an injury in fact on account of water contamination, or to whether they came within the zone of interests protected by SEPA.

[2] Next, Liberty Lake contends that the *West 514* suit was baseless because the plaintiffs lost at every stage of the proceeding. The Supreme Court has instructed, however, that "when the antitrust defendant has lost the underlying litigation, a court must resist the understandable temptation to engage in *post hoc* reasoning by concluding that an ultimately unsuccessful action must

have been unreasonable or without foundation." *Id.* at ___ n. 5, 113 S. Ct. at 1928 N. 5 (quotation marks omitted).

The Washington appellate court resolved the *West 514* plaintiffs' appeal adversely on the ground that SEPA plaintiffs must show "probable," as opposed to merely "possible," environmental harm before an EIS is required. *West 514, Inc. v. County of Spokane,* 53 Wash. App. 838, 770 P.2d 1065, 1070 *review denied,* 113 Wash. 2d 1005, 777 P.2d 1050 (1989). It then affirmed the superior court's decision on the merits, holding that the proposed shopping center's threat to economic competition in downtown Spokane did not cross the "probable" threshold. The parties disagree about whether *West 514* established a new standard for recovery under SEPA, but on any view the difference between "possible" harm and "probable" harm is a matter of degree which cannot render the lawsuit objectively baseless.

[3] Liberty Lake also suggests that the superior court must have determined that the *West 514* litigation was wholly without merit because it said that the plaintiffs' scientific evidence regarding potential harm to the Spokane aquifer "fall[s] far short of scientific probability or likelihood. When viewed in the context of the entire record, in light of the public policy enunciated in SEPA, those [expert] opinions are not persuasive." We do not read this statement as Liberty Lake would like. It is not a holding that the *West 514* plaintiffs' case had no chance of a favorable outcome, but rather it is a finding which reflects the weight accorded to their evidence.

Neither the Washington courts nor the Board intimated that the *West 514* suit was frivolous or objectively baseless. While not ultimately successful or of overwhelming strength, the suit was not so objectively

baseless that no reasonable litigant could realistically expect success on the merits. Accordingly, Liberty Lake does not get over the "objectively meritless" hurdle, and we may not, therefore, examine defendants' subjective motivation. *Professional Real Estate Investors,* ___ U.S. at ___, 113 S. Ct. at 1928.

B

Assuming that we disagree that the first prong of the *Professional Real Estate Investors* test is met, Liberty Lake nevertheless argues that the sham exception saves its action because of Magnuson's unethical conduct of the *West 514* litigation. If there is abuse in the litigation process, Liberty Lake contends, then under footnote 6 of the *Professional Real Estate Investors* opinion it is unnecessary even to reach its two-part test.

In footnote 6, the Court declined to decide "whether and, if so, to what extent *Noerr* permits the imposition of antitrust liability for a litigant's fraud or other misrepresentations." *Id.* at ___, 113 S. Ct. at 1929 n. 6. Liberty Lake points to evidence that Magnuson solicited straw parties to prosecute the *West 514* environmental challenge, that one of the plaintiffs did not wish to be a party to that litigation, that Magnuson paid the plaintiffs' legal fees, and that counsel failed to communicate settlement overtures to some of the plaintiffs. It urges that these tactics amount to fraud and misrepresentation and suffice to make the litigation sham without regard to the objective merit of the lawsuit or its proponents' motivation.

As we read the Court's footnote 6, however, it does no more than reserve the issue of whether antitrust liability may be premised on a litigant's deceptive conduct which

goes to the core of a lawsuit's legitimacy, such that it is not "genuine," either in the sense of "'having the reputed or apparent qualities or character'" (i.e., objectively "genuine") or being "'sincerely and honestly felt or experienced'" (i.e., subjectively "genuine"). *Id.* at ___, 113 S. Ct. at 1929 (quoting Webster's Third New International Dictionary 948 (1986)).[1]

Following its reservation of the question whether "fraud or other misrepresentations" may amount to "sham," the Court cited as analogous authority *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 86 S. Ct. 347, 15 L. Ed. 2d 247 (1965), which held that a patent procured by intentional fraud on the Patent Office could form the basis for a federal antitrust claim, *id.* at 176-77, 86 S. Ct. at 349-50; Justice Harlan's *Walker Process* concurrence, which emphasized that the Court's holding reached only "deliberate fraud," *id.* at 179-80, 86 S. Ct. at 351-52 (Harlan, J., concurring); and Rule 60(b)(3), which allows a party to obtain relief from judgment because of its opponent's "fraud . . . misrepresentation, or other misconduct."

[4] In a case involving a fraudulently-obtained patent, that which immunizes the predatory behavior from antitrust liability (the patent) is, in effect, a nullity because of the underlying fraud. Similarly, Rule 60(b)(3) enables a party to set aside an otherwise valid judgment on the ground that it resulted from an opposing party's fraudulent behavior or misrepresentation to the court. *See* 11 Charles Alan Wright & Arthur R. Miller, *Federal Practice and*

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[1]Footnote 6 was appended to the Court's admonition that "[t]o be sham, . . . litigation must fail to be 'genuine' in *both* senses of the word." U.S. at ___, 113 S. Ct. at 1929 (emphasis added).

Procedure: Civil § 2860, at 188-89 (1973). Read in context with the entire *Professional Real Estate Investors* opinion, footnote 6 does not obviate application of the Court's two-part test for determining sham litigation in the absence of proof that a party's knowing fraud upon, or its intentional misrepresentations to, the court deprive the litigation of its legitimacy.

[5] No such scenario is presented in this case. Liberty Lake relies mainly on the declaration of Darlene Compton, one of the *West 514* plaintiffs, to establish that Magnuson and the lawyers he employed misrepresented to several of those plaintiffs the nature of the litigation. In her declaration, however, Compton states that she willingly agreed to become a named plaintiff in the case because of her sincere interest in the lawsuit's stated claim for relief, namely, an updated EIS for the proposed Liberty Lake development. Compton also states that, at the time of the original appeal to the Board, she wasn't particularly concerned about who was providing financial support for the litigation. Compton did not express a desire to withdraw from the lawsuit until the superior court issued its final ruling. That ruling was filed on March 7, 1988, nearly 13 months after the filing of the appeal to the Board and the subsequent breakdown of Liberty Lake's attempt to sell the land to a willing purchaser, ten months after the Bon withdrew its letter of intent to be an anchor tenant at the Liberty Lake mall, and eight months after Liberty Lake notified its potential buyer that it would begin to seek other developers for the property. Even without Compton's willing participation, it isn't possible to characterize the *West 514* litigation as lacking legitimacy. Nothing in the record indicates the remaining *West 514* plaintiffs were unwilling participants in the litigation. For similar reasons, the failure of the *West 514* attorneys to inform

Compton of the opposing side's settlement overtures does not render the litigation illegitimate.

Liberty Lake's evidence at most goes to Magnuson's motivation, which we are precluded from examining. *Professional Real Estate Investors,* ___ U.S. at ___, 113 S. Ct. at 1928. The Court's opinion makes it clear that unless a lawsuit is objectively baseless, whether an antitrust defendant "was indifferent to the outcome on the merits" of the suit, or "had decided to sue primarily for the benefit of collateral injuries inflicted through the use of legal process" is immaterial. *Id.* at ___, 113 S. Ct. at 1931 (citing as *"contra" Grip-Pak, Inc. v. Illinois Tool Works, Inc.,* 694 F.2d 466, 472 (7th Cir. 1982), *cert. denied,* 461 U.S. 958, 103 S. Ct. 2430, 77 L. Ed. 2d 1317 (1983), in which Judge Posner suggested that "[t]he line is crossed when [the antitrust defendant's] purpose is not to win a favorable judgment against a competitor but to harass him, and deter others, by the process itself — regardless of outcome — of litigating"); *cf. id.* ___ U.S. at ___-___, 113 S. Ct. at 1935-36 (Stevens, J., concurring in the judgment but disagreeing with the majority that prosecuting a lawsuit in which the plaintiff is indifferent to the outcome but has sought to impose a collateral harm on the defendant by such things as abusing the discovery process is not sham). As the conduct upon which Liberty Lake relies boils down to indifference to outcome and intent to inflict injury through collateral consequences, it is irrelevant and summary judgment was properly entered.

III

We review for abuse of discretion the district court's denial of a Rule 56(f) motion for additional discovery prior to summary judgment. *Garrett v. City &*

County of San Francisco, 818 F.2d 1515, 1518 (9th Cir. 1987).

Liberty Lake's Rule 56(f) arguments are directed toward the district court's summary judgment ruling on antitrust standing grounds. Because we affirm on *Noerr-Pennington* immunity grounds, we need not decide whether the district court abused its discretion in deciding the standing issue without allowing additional discovery.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

NO. C-89-00823-RJM

ORDER GRANTING SUMMARY JUDGMENT

LIBERTY LAKE INVESTMENTS, INC.

Plaintiff,

v.

HARRY F. MAGNUSON, et al.

Defendants.

Argued and Submitted
December 20, 1991

Filed March 10, 1992

Before: Robert J. McNichols, United States District Judge

BEFORE THE COURT are the Defendants' Motions for Summary Judgment. (CR 287, 288, 305). A hearing with oral argument was held on these matters on December 20, 1991, at 8:30 a.m.. Having considered the arguments of counsel, reviewed the record, and being fully advised in this matter, IT IS HEREBY ORDERED that the Defendants' Motions for Summary judgment are **GRANTED.**

STATEMENT OF THE CASE

A summary of the undisputed or inadequately contested facts drawn primarily from contemporaneous correspondence, memoranda, and other documentation is as follows.

A: GENERAL BACKGROUND

In July, 1976, the Wells B. McCurdy Trust (Trust) was formed with Wells B. McCurdy as trustee. The sole stated purpose of the Trust was to hold the interest and title in property intended for the development of a regional shopping center located approximately fifteen miles east of Spokane, Washington. The property is roughly equidistant between Spokane and Coeur d'Alene, Idaho, and a mall there would hopefully draw business from both the Spokane and Northern Idaho markets. The trustee was empowered to carry on ordinary business activities, and the Trust began laying the groundwork for development, including securing appropriate zoning for the property.

The Trust actively sought purchasers for the property, wanting a buyer who would construct the desired regional shopping mall. The Trust negotiated with several possible buyers with varying degrees of success.

Shopping malls require large anchor tenants to be successful. Both the Trust and certain possible buyers contacted potential anchor tenants, the Bon and Sears showing the strongest interest. However, in November, 1983, Sears notified the trust they did not believe the area market would support a second Sears store until approximately 1990.

In March, 1984, the Bon committed to the mall site as an anchor tenant, contingent on two other department store tenants acceptable to the Bon being secured. The commitment was based on the March 20 proposal submitted by Graham Development Services, Inc., the promising buyer at the time. The proposal provided a short list of proposed co-anchor tenants; Penneys, Sears, Lamonts, Nordstrom, and the Crescent.

In April, 1984, the Trust met with Nordstrom representatives concerning possible mall tenancy, but Nordstrom was not interested. Shortly thereafter, Sears contacted Graham Development, notifying them a Sears store was not foreseen at the mall site in the immediate future, and characterizing Sears' position as not interested. In July, the Trust attempted modifying the agreement with the Bon to require only one other anchor tenant. The Bon rejected the proposed amendment, insisting on two acceptable co-tenants. The Bon's position on the number and acceptability of co-tenants would continue unchanged.

In September, 1985, the Trust reached a sale agreement with a Utah developer. The developer, Winget, Vichrilli & Ford (WVF), sent a proposal to the Bon agreeing with Bon's requirement of two other acceptable stores as anchor tenants, and listed possible candidates as Penneys, Mervyns, Shopko, Sears, Lamonts, Nordstrom, and the Crescent. The Bon president at the time, William

Fix, has since stated Mervyns and Shopko were considered low-end stores, and could not have operated together as the other required anchor tenants.

WVF was unable to secure commitments from two qualifying tenants, and in June, 1986, Bon began pressuring the Trust to move mall development along. A June 10 letter reminded the Trust the Bon's decision to build included the stipulation of an August 1987 opening with two other anchor stores. The Bon felt it was obvious an opening on the agreed date was impossible due to WVF's lack of performance, and suggested the Trust regain control of the property and find a more successful developer.[1]

On June 17, 1986, the relationship between the Trust and WVF was terminated because WVF had not secured the requisite anchor tenants. Within a week, the Cafaro Company (Cafaro) approached the Trust expressing interest in developing the mall.

In August, 1986, Cafaro met with the Washington State Department of Transportation (DOT) regarding

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1

> "The Board of directors of Allied Stores Corporation approved the building of a store at Liberty Lake with the stipulation that we open in August 1987 with two other majors.
>
> It is obvious to me that we will not open in August 1987 due to lack of performance on the part of your developer.
>
> I suggest you get control of the property and find a new developer who is more responsive to both our needs."

Defendants' Ex. 40. (letter from Fix to McCurdy).

access to and traffic around the mall site. Cafaro was informed by the DOT that expensive improvements would be necessitated by the construction of the mall, and the developer would be expected to provide a substantial share of the costs.[2] DOT's policy regarding substantial sharing of the total costs would remain unchanged.[3]

In October, Cafaro essentially reiterated WVF's proposal to the Bon, adding Target and Emporium as

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[2]An August 22, 1986 DOT memo to file described a DOT meeting with representatives of Cafaro. The meeting concerned the improvements needed for the Greenacres and Harvard Road Interchanges on Interstate 90 if a mall at Liberty Lake was built.

The DOT representative wrote:

> "I explained that both interchanges function adequately now, and without the mall development, the only thing we need to do is to replace the Harvard Bridge Rail and improve vertical clearance. In other words, we do not plan to move ahead with these projects in the near future.
>
> Mr. Richley asked how they could change our attitude toward priority. I said that the best way was to contribute funds to the project. He asked if I meant the 10 percent state share. I said no, I meant a major share of both the state and federal funds, since federal dollar availability was the major problem."

Defendants' Ex. 44.

[3]The DOT eventually arrived at 41% as the appropriate share of total costs required from a developer. The estimates of the total costs necessary for the required improvements ranged from a low of $4,874,200 (Defendants' Ex. 74), to median amounts of $5.5 million (DOT Final Environmental Impact Statement, p. 80) and $7.6 million (Defendants' Ex. 73), to a high of $10 million (Defendants' Ex. 44). 41% of an average of these amounts leads to an expected investment from a developer of close to $3 million.

possible anchor tenants. The Bon accepted the proposal, again reserving the right to approve the other anchor tenants. Fix has since stated Target in combination with Mervyns or Shopko would not have been acceptable to the Bon.

Liberty Lake Investments, Inc., the plaintiff here, incorporated in December, 1986. Shortly after incorporating, the plaintiff purchased an outstanding loan from SeaFirst Bank secured by the Trust property to prevent foreclosure.

On December 16, 1986, Cafaro wrote to the Trust describing Sears as "the key to this project," and discussing setbacks in securing Sears as an anchor tenant. Particular attention was paid to a Sears market report indicating possible problems with a store at the mall, and showing more favorable conditions for a store in Coeur d'Alene, Idaho. The letter also stated any interest by Target and Mervyns was contingent on the tenancy of Sears, and that Nordstrom, Crescent, and Penneys were reluctant to pursue a project at Liberty Lake.[4]

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[4]J.J. Cafaro wrote McCurdy, stating the Cafaro Company, remained highly interested in the project, such interest being predicated upon Cafaro's ability to obtain two major department stores.

Cafaro continued:

> "As you have always understood, the second major department store and the key to this project is Sears."

Defendants' Ex. 53.

The letter discussed serious difficulties in securing Sears as an anchor tenant, among them the retirement of the Sears' Regional Retailing manager who had been enthusiastic about the mall. The letter also described the disappointing and negative results of Sears'

The letter concluded that until an agreement could be reached with Sears, it was impossible to move the project forward. Sears' lack of interest is recognized in Cafaro's proposal to Sears on December 26, 1986, which explicitly recognized Sears' preference for developing a project in Coeur d'Alene.[5]

Cafaro's development plan for the mall was approved by the Spokane County Hearing Examiner Committee on January 8, 1987, contingent on Cafaro reaching a negotiated agreement with the DOT for sharing costs of the improvements necessitated by the Mall.[6] In

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area marketing study. Cafaro concluded:

> "With all of the above referenced points in mind, it would be necessary to make an extremely attractive offer to Sears in order to sway them to locate . . . at Liberty Lake."

Id.

[5]The Cafaro Company sent a proposal to Sears on December 26, 1986, which opened:

> ". . . I realize that it is your preference to develop a project in Coeur d'Alene vs. the Liberty Lake area . . ."

Defendants' Ex. 55.

[6]The Committee Findings and Order provided:

> "D. CONDITIONS OR CONTINGENCIES APPLIED TO THIS APPROVAL
>
> 1. The Sponsor will negotiate an agreement for on and off-site highway improvements with the State Department of

February, the Board of County Commissioners approved the decision of the Hearing Examiner Committee, issuing a formal decision on March 10, 1987.

On April 9, 1987, a notice of appeal and application for writ of review of the Board decision was filed in Spokane County Superior Court by defendants West 514, Inc., Antone and Sundena Plese, and Darlene Compton. A writ was subsequently issued by Judge Donohue. The *West 514* litigation in large part serves as plaintiff's basis for this suit, and is discussed in more detail below. The *West 514* plaintiffs essentially claimed the Board inadequately considered the environmental impact of a large, regional mall on the underlying aquifer which provides fresh water to much of Spokane County.

On April 14, 1987, a development company announced plans to build the Silver Lake Mall in Coeur d'Alene. The primary anchor tenants were Penneys and Sears. Penneys felt the enclosed mall in Coeur d'Alene would eliminate the possibility of a Liberty Lake area mall, which they believed would be detrimental to the sales of Spokane Penneys stores.

During this time, Cafaro and the DOT discussed appropriate cost-sharing, but had not reached an agreement. Cafaro wished to provide only 41% of the 10% local share of the state costs for the improvements, while the DOT felt Cafaro was obligated to account for a

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> Transportation and Spokane County. This agreement will be based on a pro-rata share of the Liberty Lake Mall's traffic impacts . . ."

Defendants' Ex. 60.

fair share of the total costs.[7] In a memorandum dated May 13, 1987, Cafaro stated "if we have to pay 41% on total project, this deal is dead."[8] Cafaro never reached an agreement with the DOT on cost-sharing.

Also on May 13, the Bon ownership, Allied Stores Corporation, wrote Cafaro and canceled their Letter of Intent to open and operate a store at the mall. The short letter cited Cafaro's inability to deliver an operational store

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[7]The DOT representative, describing the meeting with the Cafaro Company in a DOT internal memorandum, stated:

> "I explained that we have a severe shortage of both State and Federal I-4R funds, and that to be considered, their offer must include their fair share of both State and Federal costs."

Defendants' Ex. 69 (emphasis in original).

[8]Defendants' Ex. 111. Two days later, on May 15, the DOT wrote Cafaro:

> "The Theory behind computation of Cafaro's share of the highway improvements is that Cafaro should pay for a share of total project costs in the same proportion that Mall traffic contributes to total traffic. As we discussed in our meeting, we expect Cafaro to fund their fair share of the total cost of both Greenacres and Harvard Rd. Interchange improvements, including both State and Federal funded portions of the project."

Defendants' Ex. 72 (emphasis in original).

by August, 1987, and Cafaro's failure to find the two additional anchor stores.[9]

On April 28, 1987, the plaintiff filed suit foreclosing on the Trust property. This suit was settled a month later, the plaintiff to sell the property and distribute the proceeds according to a set formula. The sale of the property was not considered imminent, and it was understood the sale could possibly not occur for several years.

In the summer of 1987, the Bon ownership began demanding more favorable arrangements for mall participation from Cafaro. Cafaro felt the Bon's position was unreasonable, and continued seeking alternate anchor tenants for the mall. Cafaro expected no firm arrangements with alternate tenants for several years, and

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[9]Fix wrote J.J. Cafaro:

> "You will recall that I gave you a Letter of Intent which was subject to performance. You guaranteed at that time that a Shopping Center would be opened by August of 1988, so that we could start operation at that time. You further stated that if we would allow you to go fast-track and construct our store, that you could open the center in August 1987 which was very interesting to me. You were further supposed to advise me long ago about your commitments regarding the two additional department stores.
>
> It is quite obvious that you have not performed accordingly and would be unable to deliver the store, or the two additional department stores, for August 1987. In view of this, I am hereby canceling my Letter of Intent."

Defendants' Ex. 71.

informed the plaintiff. The plaintiff remained committed to the mall project with Cafaro, but told them if the mall could not be timely completed, the plaintiff would seek other purchasers of the land, including the proposed mall site.

In August, 1987, Cafaro informed the plaintiff that absent a lawsuit compelling Allied Stores' performance, Cafaro did not see the Liberty Lake Mall being developed at that time. Cafaro representatives stated Cafaro would start the center the instant they had a workable arrangement with The Bon or its equivalent. However, they also indicated prospects of a deal with the Bon were not promising, and no alternatives to the Bon were in mind.[10] Within a week, the plaintiff notified Cafaro the property was being placed on the market.[11]

In February, 1988, Cafaro approached the plaintiff with a proposal for the mall involving the purchase of certain Crescent stores, but plaintiff expressed no interest, stating the plaintiff's owners were not shopping center

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[10]Defendants' Ex. 77.

[11]William Rademaker wrote J.J. Cafaro following a meeting with Cafaro Company representatives. Rademaker's understanding was:

> ". . . that absent a satisfactory arrangement with The Bon or equivalent, The Cafaro Company would not move forward with the project. We discussed at some length the status of negotiations with The Bon and concluded that the situation was far less than optimistic."

Defendants' Ex. 79.

developers.[12] On April 20, 1988, plaintiff approached another possible developer for the site, stating plaintiff was not interested in developing a shopping center, preferring to sell property to a developer who would undertake the mall project.

In May, Cafaro indicated that in the event sufficient commitments from anchor tenants for the mall were secured, Cafaro would commence the center despite the on-going *West 514* litigation.[13] Cafaro approached the

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[12]As described by Rademaker in a memo to file:

> I told him that the Liberty Lake Investments, Inc.'s ownership were investment/landholders who were interested in selling acreage and were not shopping center developers and operators.

Defendants' Ex. 80.

[13]In a May 11, 1988 memo to the Liberty Lake Investors, Rademaker described a meeting with J.J. Cafaro, stating Cafaro:

> ". . . indicated that in the event the Cafaro Company had sufficient commitments to commence the center and the current litigation was ongoing to the appeal process, the Cafaro Company would commence the center despite the litigation. He said that they did this in Puyallup in the face of what they viewed as much stronger opposition. The Cafaro Company would, in essence, indemnify the majors from any loss in the event the adverse court ruling required them to demolish the center."

Defendants' Ex. 82.

Following the December 20, 1991 oral argument, plaintiff presented additional exhibits supporting plaintiff's arguments that delays from the *West 514* litigation were responsible for the failure of the mall development project. These exhibits consist of a memo from

Bon again with a proposal in December, which Allied Stores rejected in a short letter written January 27, 1989.

B: THE *WEST 514* LITIGATION AND FACTS RELATING TO NOERR-PENNINGTON

Defendant Harry Magnuson is a wealthy investor with significant financial interests in Spokane area real estate and shopping malls. Magnuson was actively seeking to develop a mall in Coeur d'Alene during the time plaintiff and the Trust were attempting to secure anchor tenants for the Liberty Lake Mall.

In October, 1985, Magnuson met with the Bon and was told of the Bon's commitment to the Liberty Lake project. Magnuson argued the Liberty Lake project was unworkable, and told Fix he was going ahead with his Coeur d'Alene development, and he could stifle and prevent the people from going to Liberty Lake.

In a letter to defendant Orville Barnes describing the meeting with the Bon, Magnuson indicated he was planning to move forward so the Liberty Lake plan could be stifled. In another letter to Tom Rowe in February, Magnuson stated he would like to do anything possible to head off the Liberty Lake development because of possible harm to Coeur d'Alene and Northern Idaho. Other documents indicate Magnuson remained concerned about the Liberty Lake project and the threat it posed to his Spokane mall and his proposed Coeur d'Alene development.

Wells McCurdy, a letter from Cafaro's counsel to William Fix, and several newspaper articles. It should be noted that all the exhibits, with the exceptions of a July, 1989 newspaper article, were authored before the May, 1988 memo quoted above.

As mentioned above, Cafaro's development plan for the mall was approved by the Spokane County Hearing Examiner Committee on January 8, 1987. This decision was appealed to the Board of County Commissioners. In February, the Board affirmed the decision of the Hearing Examiner Committee, issuing a formal decision on March 10, 1987. These decisions approved the adoption of a Mitigated Determination of Non-Significance (MDNS) because of a prior Environmental Impact Statement (EIS) prepared for the site for a similar project which was not developed. The prior EIS was considered sufficient along with the MDNS, and a new or supplemental EIS was not required.

On April 9, 1987, a notice of appeal and application for writ of review of the Board decision was filed in Spokane County Superior Court by defendants West 514, Inc., Antone and Sundena Plese, and Darlene Compton. The *West 514* plaintiffs essentially claimed the Board in adopting the MDNS inadequately considered the environmental impact of a large, regional mall on the underlying aquifer which provides fresh water to much of Spokane County. The plaintiffs were also concerned about possible blight to downtown Spokane. The Superior Court found standing and issued a writ of review.

On April 19, 1988, Judge Michael Donohue entered a judgment upholding the county's approval of the plan. The court found that in Washington State, economic concerns were not environmental concerns. The court noted the majority of the material before the Board pertained to economic blight, and determined the evidence led the court "to the inescapable conclusion that the real issue is just what the rules exclude from environmental consideration: economic competition." The court also

found the opinions of the plaintiffs' experts unpersuasive and lacking the requisite scientific probability.

The decision of the Superior Court was itself appealed. On April 13, 1989, the Washington State Court of Appeals published an opinion, *West 514, Inc. v. County of Spokane*, cited at 53 Wn. App. 838, upholding the trial court decision. The Washington State Supreme Court denied the plaintiffs' petition for review on June 28, 1989.

The *West 514* litigation moved slowly through the state courts. Transcripts from the Superior Court proceedings indicate the delays were caused by the busy schedules of everyone involved. At one point, acceleration of scheduling was being discussed. After Judge Donohue commented that the case was "proceeding at glacial speed," counsel for Cafaro responded that while Cafaro wanted the case to move along, "some deliberateness is

necessary if it's gonna get done right."[14] A Stipulated Order was eventually entered accelerating the schedule.

The appeal also proceeded slowly, the delays attributable to both parties. A memo from plaintiff's president dated August 7, 1987, states Cafaro had instructed their Spokane counsel to proceed slowly on the

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[14]A portion of the October 8, 1987 transcript contains the following exchange:

> "THE COURT: Why has it taken this long to get it back to me? Is it just a matter of scheduling?
> MR. GAYLORD: Just a matter of schedule, some continuances by parties –
> THE COURT: Some of my unavailability, too."

Defendants' Ex. 108. The Scheduling Order was subsequently discussed:

> "THE COURT: Can we shorten that? Is it possible?
> MR. SYMMES: Let's shorten it. I think we should shorten –
> THE COURT: It seems to me we are proceeding at glacial speed, and I would like to get a move on if we can.
> MR. EMACIO: (representing Spokane County) . . . I am not willing to shorten because I think, your Honor, the issues are so important here, the record has to be done right. And quite frankly, the issues need to be articulated in a very precise manner. I see no need for urgency in this regard . . .
> MR. SCHULTZ: Your Honor, perhaps my client has greatest interest in moving this along in a hurry. He is the developer of it. He does wish to move it along; however, I have been involved in these cases many times and I know some deliberateness is necessary if it's gonna get done right . . ."

Id.

appeal because of settlement negotiations involving defendant Magnuson.[15]

Evidence presented to this court indicates defendant Harry Magnuson paid the legal costs incurred in appealing Spokane County decisions and pursuing the *West 514* litigation. There is also evidence Magnuson, through defendant Orville Barnes, solicited certain *West 514* plaintiffs to bring the action.

LAW ON SUMMARY JUDGMENT

A summary judgment shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c).

On a motion for summary judgment, this court must determine if a fair-minded jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). The party seeking summary judgment must show no genuine issue of material fact exists and he is entitled to judgment as a matter of law by showing the court there is an absence of evidence to

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[15]Rademaker's August 1, 1987 memo to Liberty Lake Investors, Inc. stated Cafaro's representative had informed Rademaker:

> ". . . that he had instructed Mr. Schultz, Spokane counsel, to slow up on the appeals litigation because of [difficulty with securing anchor tenants] and because, in Mr. Daniluk's view, a settlement is in the offing."

Defendants' Ex. 77.

support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

The party opposing the motion must do more than simply show that there is some metaphysical doubt as to the material facts. *Matsushita Elec. Industrial Co. v. Zenith Radio*, 475 U.S. 574, 586 (1986). That party must go beyond the pleadings to designate specific facts establishing a genuine issue for trial. *Celotex*, 477 U.S. at 324. The nonmoving party may do this by use of affidavits (including his own), depositions, answers to interrogatories, and admissions. *Id.* However, all inferences drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. *Matsushita*, 475 U.S. at 587.

FEDERAL ANTITRUST CODE

This action is based on the following sections of Federal anti-trust code. Every contract or conspiracy in restraint of trade or commerce is declared to be illegal, and every person who shall make or engage in any such contract or conspiracy shall be deemed guilty of a felony. 15 U.S.C. § 1. Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in the appropriate United States district court without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of the suit, including a reasonable attorney's fee. 15 U.S.C. § 15(a).

DISCUSSION

Defendants seek summary judgment on three issues:
(1) plaintiff's standing to bring an antitrust action;
(2) whether a conspiracy existed causing an appropriate

injury; and (3) whether the *Noerr-Pennington* doctrine protects the defendants. The first and third issues present substantial questions of law and are addressed. The second issue predominantly concerns questions of fact but because of the disposition of the first and third issues need not be addressed.

A: STANDING

The issue of status as a proper party in an antitrust suit is a pure question of law. *Eagle v. Star-Kist Foods, Inc.*, 812 F.2d 538, 539 (9th Cir. 1987).

The current elements of antitrust standing have their basis in *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982), and *Associated General Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983). In *McCready*, the Court found standing for the party who brought the underlying action although she was not a competitor of the conspirators because the injury she suffered was inextricably intertwined with the injury the conspirators sought to inflict on the market. *McCready*, 457 U.S. at 484. *Associated General Contractors* went further, enumerating several factors to be considered by courts in determining standing. *Associated General Contractors*, 459 U.S. at 537-45.

The Ninth Circuit has analyzed *McCready* and *Associated General Contractors* to develop a clear list of factors for determining standing. Defendants cite *Star-Kist Foods, Inc.*, 812 F.2d at 540, which identifies the relevant factors as:

(1) The nature of the plaintiff's alleged injury-whether it was the type the antitrust laws were intended to forestall;

(2) The directness of the injury;
(3) The speculative measure of the harm;
(4) The risk of duplicative recovery; and
(5) The complexity in apportioning damages.

Defendants also cite *Sacramento Valley, Chapter of Nat. Electrical Contractors Asso. v. IBEW, Local 340*, 888 F.2d 604, 605 (9th Cir. 1989), which substitutes "keeping the scope of complex antitrust trials within judicially manageable limits" for the fourth and fifth factors in *Star-Kist Foods, Inc.*.

Plaintiffs cite more recent decisions enumerating slightly different factors. The plurality opinion in *R.C. Dick Geothermal Corp. v. Thermogenics, Inc.*, 890 F.2d 139, 146 (9th Cir. 1989) (en banc), has become the leading decision on antitrust standing in the Ninth Circuit, and lists the relevant factors as:

1. The specific intent of the alleged conspirators;
2. The directness of the injury;
3. The character of the damages, including the risk of duplicative recovery, the complexity of apportionment, and their speculative character;
4. The existence of other, more appropriate plaintiffs;
5. The nature of the plaintiff's claimed injury.

No single factor is determinative, and the court must balance all the factors. *Id.*

The second and fifth factors are crucial in the present case. The second factor in the antitrust contest means close in the chain of causation. *R.C. Dick*

Geothermal Corp., 890 F.2d at 147. The fifth factor requires that the injured party be a participant in the same market as the alleged malefactors. *Id.* A plaintiff who is neither a competitor nor a consumer in the relevant market does not suffer antitrust injury. *In re Insurance Antitrust Litigation*, 938 F.2d 919, 926 (9th Cir. 1991).

Regarding the second factor of antitrust standing, the directness of the injury, the evidence shows the plaintiff was unable to secure commitments from anchor tenants. The only firm commitment plaintiff had was from the Bon, and this agreement was contingent on (1) an August, 1987 opening, and (2) commitments from two other anchor stores acceptable to the Bon. The Bon ultimately terminated its Letter of Intent, citing the impossibility of a timely opening and the failure to secure other anchor tenants.

Plaintiff's right to build was also contingent. Spokane County expressly conditioned development of the mall on Cafaro and the DOT agreeing on a cost-sharing plan for the required road improvements. No agreement was reached before the Bon withdrew, and the positions of Cafaro and the DOT on the amount for which Cafaro would be responsible remained far apart.

Considering the evidence, any injury suffered by the plaintiff is not close in the chain of causation to any of defendants' acts in pursuing the *West 514* litigation. The contemporaneous documents presented contain nothing indicating the *West 514* litigation, and any delays caused by that litigation, concerned Cafaro or the plaintiff in their plans to develop the mall. On the contrary, there is evidence showing the plaintiff and Cafaro were themselves to blame for certain litigation delays, and intended to develop the mall in spite of the litigation, having

previously faced and overcome similar, more difficult opposition in Puyallup, Washington.

Regarding the fifth factor, there is evidence plaintiff was not an appropriate marketplace competitor. Plaintiff had never previously constructed a mall. Plaintiff also negotiated with numerous development organizations in a constant effort to sell the land. Contemporaneous documents indicate plaintiff did not consider itself a developer, wishing instead to find a buyer who was.

After all the factors have been considered, inquiry into standing is still not complete without determining whether the alleged injury was inextricably intertwined with injury to competition in the relevant markets. *R.C. Dick Geothermal Corp.*, 890 F.2d at 150. It has been questioned whether *McCready* provides an independent basis for standing as apparently indicated by *R.C. Dick Geothermal Corp. In Re Air Passenger Computer Reservation Systems*, 727 F. Supp. 564, 568 (C.D. Cal. 1989).

McCready was decided prior to, and is cited by, *AGC*, which in turn forms the basis of the leading en banc decision in *R.C. Dick Geothermal*. *AGC* was aware of *McCready*, but does not include the "inextricably intertwined" test as a distinct factor. Further, the directness of the injury factor is substantially similar to this test.

Assuming *McCready* does provide a distinct test to be applied after the five factors of *R.C. Dick Geothermal* are considered, any injury sustained by plaintiff must be "inextricably intertwined" with defendants' actions in pursuing the *West 514* litigation. As discussed above, plaintiff was unable to secure anchor tenants and failed to

reach a cost-sharing agreement with the DOT. Further, plaintiff was responsible for some of the litigation delay and intended to proceed with the mall in spite of the litigation. Considering the contemporaneous evidence, the failure of the plaintiff's mall project was not inextricably intertwined with defendants' actions.

B: *NOERR-PENNINGTON* AND SHAM LITIGATION

No violation of the Sherman Act can be predicated upon mere attempts to influence the passage or enforcement of laws. *Eastern R. Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 135 (1961). It is neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors. *Noerr*, 365 U.S. at 139. The Sherman Act may not be extended to regulate activities of a political nature simply because those activities have a commercial impact and involve conduct that can be termed unethical. *Noerr*, 365 U.S. at 141.

Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. *United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965). *Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose. *Id.* Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act. *Id.* The *Noerr-Pennington* philosophy governs the approach of citizens or groups of them to administrative agencies and to courts. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972).

There may, however, be situations where such conduct, ostensibly directed toward influencing

governmental action, is a mere sham to cover what is actually an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified. *Noerr*, 365 U.S. at 144.

The sham exception of *Noerr* encompasses situations in which persons use the governmental *process* as opposed to the *outcome* of that process as an anti-competitive weapon. *Columbia v. Omni Outdoor Advertising, Inc.*, 111 S. Ct. 1344, 1354 (1991). A sham situation involves a defendant whose activities are not genuinely aimed at procuring favorable government action. *Id.* A sham suit is one that is an abuse of the judicial processes. *Columbia Pictures Industries, Inc. v. Professional Real Estate Investors, Inc.*, 944 F.2d 1525, 1529 (9th Cir. 1991). The Supreme Court has identified two types of sham activity: "misrepresentations in the adjudicatory process" and the pursuit of "a pattern of baseless, repetitive claims." *Id.*

In the Ninth Circuit, an antitrust plaintiff must make a two-part showing to support a finding of sham: (1) that the suit is baseless -- a legal question; and (2) that the suit was brought as part of an anticompetitive plan external to the underlying litigation -- a question of fact. *Columbia Pictures*, 944 F.2d at 1532.

There is no basis for holding that a suit brought with probable cause in fact or law may be a sham because such a holding would erode the First Amendment right to petition that is the basis for the *Noerr-Pennington* doctrine by imposing the risk of treble damages for initiating a suit based on a well-founded, but untested, legal theory. *Columbia Pictures*, 944 F.2d at 1531. Simply stated, a suit brought with probable cause does not fall within the

sham exception to the *Noerr-Pennington* doctrine. *Columbia Pictures*, 944 F.2d at 1532.

The Sixth Circuit has extended *Noerr-Pennington* protection to a city's efforts to block construction of a sports arena, finding the various legal actions taken by the city in opposing the arena were sufficiently based. The court stated it would avail an antitrust plaintiff nothing to show that the defendant surreptitiously caused a front man to institute a lawsuit against the plaintiff, even if the suit proved to be without merit, absent a showing of clear abuse of process. *Opdyke Investment Company v. City of Detroit*, 883 F.2d 1265, 1273 (6th Cir. 1989).

The court noted that although the state trial court rejected the legal theory on which the underlying litigation was predicated, the court did not treat the theory as frivolous. *Id.* The court was also not presented with any evidence or suggestion of perjury, bribery, or any other such reprehensible practice, ultimately finding the underlying litigation was not sham, notwithstanding that the prosecution of the lawsuit was presumably part of a broader pattern of conduct intended to block construction. *Id.*

The *West 514* litigation challenged the decision of the Spokane Board of County Commissioners affirming the decision of the Hearing Examiner Committee to approve the adoption of a Mitigated Determination of Non-Significance (MDNS) because of a prior Environmental Impact Statement (EIS) prepared for the site for a similar, failed project. The prior EIS was considered sufficient along with the MDNS, and a new or supplemental EIS was not required. As stated before, the *West 514* plaintiffs essentially claimed the Board in adopting the MDNS inadequately considered the potential harmful impact of a

large, regional mall on the aquifer providing fresh water to much of Spokane County, and on downtown Spokane.

A large development over a crucial aquifer is at first blush reason for some concern, and the occasionally disastrous effects of regional malls on urban downtowns have been documented. Though unsuccessful, the *West 514* litigation was sufficiently based to warrant full proceedings from the Spokane County Superior Court and the Washington State Court of Appeals. The Court of Appeals decision is published at 53 Wn. App. 838, 770 P.2d 1065 (1989), and is criticized by some commentators. As a matter of law, the *West 514* litigation was not baseless.

CONCLUSION

It is clear from the exhibits that the plaintiff faced obstacles more serious than any difficulty presented by the *West 514* litigation. The contemporaneous documents emphasize the inability to obtain commitments from qualifying anchor tenants and the lack of an agreement with the DOT. The contemporaneous documents make no mention of problems caused by delay from the litigation, and even indicate some delay was desired by plaintiff and Cafaro. In fact, the exhibits show plaintiff was willing to proceed with the mall project in spite of the litigation if adequate anchor tenants could be secured.

The exhibits also make clear that defendants Harry Magnuson and Orville Barnes did not want the mall constructed. However, the evidence does not indicate their actions violated the plaintiff's rights.

IT IS THEREFORE ORDERED that Defendants' Motions for Summary Judgment are **GRANTED**.

IT IS SO ORDERED. The Clerk is directed to enter this Order and forward copies to counsel.

DATED this 10th day of March, 1992.

/s/ Robert J. McNichols
ROBERT J. McNICHOLS
United States District Judge

(2)

Supreme Court, U.S.
FILED
JUL 5 1994
OFFICE OF THE CLERK

No. 93-1978

In The

Supreme Court of the United States

October Term, 1994

LIBERTY LAKE INVESTMENTS, INC.,

Petitioner,

vs.

HARRY F. MAGNUSON, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

ROBERT B. HENDERSON
HENDERSON AND KELLMAN, P.C.
1017 Washington Mutual Building
Spokane, WA 99201
(509) 623-2900

Counsel for Respondents Barnes and McCarthy Management, Inc.

LESLIE R. WEATHERHEAD*
WITHERSPOON, KELLEY, DAVENPORT & TOOLE
1100 U.S. Bank Building
Spokane, WA 99201
(509) 624-5265

Counsel for Respondents Magnuson, Plese and University City, Inc.

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

I. RULE 29.1 STATEMENT.

Respondents University City, Inc. and McCarthy Management and Development Co., Inc. are closely held, non-public Washington corporations. Neither corporation has any parent, and neither has any subsidiaries other than wholly-owned subsidiaries. As of June 1993, McCarthy Management and Development Co., Inc. was renamed Barnes Management and Development Inc. The ownership of the corporation was not changed.

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I. STATEMENT OF THE CASE.

A. Proceedings Below.

Petitioner filed this case in the United States District Court for the Eastern District of Washington on December 29, 1989.[1] A year and a half later, on June 12, 1991, Respondents moved for summary judgment. The motion for summary judgment was argued over a full day on December 20, 1991 on a record consisting of nearly two thousand pages of affidavits, exhibits and briefs.

The District Court granted summary judgment. The District Court held there was no genuine issue of material fact (1) that Petitioner lacked antitrust standing[2] because Respondents had not caused any loss allegedly suffered by Petitioner and because Petitioner was not competitor or consumer in any market in which Respondents do business, and (2) that the Respondents' efforts to convince the county to change its mind about permitting a shopping mall (and the ensuing lawsuit) were privileged.[3]

Petitioner appealed, and the Court of Appeals reviewed the order for summary judgment *de novo*.[4] The Court of Appeals affirmed. Its decision turned solely on

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[1] An identical complaint was filed in State Court (where it is still pending) the same day.

[2] The District Court applied the standing test of *Associated General Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983), *See* Appendix to Petition for Writ of Certiorari (hereafter "Pet. App."), 19b.

[3] *See* Pet. App. B.

[4] *See* Pet. App. 4a.

the issue of privilege, which it found dispositive, obviating any need to address standing. Rehearing was denied, and the Petition to this Court ensued.

B. Facts.

1. Introduction.

Consonant with their clear duty to keep this brief "as short as possible,"[5] Respondents do not here set out the entire record of events leading to this lawsuit. Rather, Respondents here summarize for the Court, solely to avoid any possibility of waiver,[6] the critical facts as to which, the district and appellate courts held, Petitioners failed to produce evidence sufficient to create a genuine issue of material fact (the bare assertions in the Petition notwithstanding).

2. Respondents Did Not Cause Petitioner Harm.

Petitioner is a landowner. It wished to sell some of its land to the Cafaro Co., a shopping mall developer. The undisputed evidence was (as the district court found[7]) that Petitioner's alleged loss flowed from the failure by

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[5] Sup. Ct. R. 15.4.

[6] Sup. Ct. R. 15.1: " . . . [T]he brief in opposition should address any perceived misstatements of fact . . . . Counsel are admonished that they have an obligation to point out any perceived misstatements in the brief in opposition, and not later."

[7] Pet. App. 21b-23b.

the Cafaro Co. (which was not a party to the lawsuit) to perform a contract to buy a piece of land from Petitioner. It was undisputed that the Cafaro Co. decided against buying the property (where it had considered building a shopping mall) *not* because Respondents aided an unsuccessful challenge to the zoning decision which permitted a mall, but because market factors militated against building a mall there. The Cafaro Co. considered the costs too high,[8] and demand by retail tenants too weak,[9] to allow for a successful mall project.

3. There Was No "Antitrust Injury".

The district court also held it was undisputed that Petitioner's alleged loss flowed from a frustrated contract, not from any injury to competition. In other words, the undisputed facts were that Petitioner was not a consumer or competitor in any relevant market with Respondents, and any injury was not "antitrust injury."[10]

---

[8] The local officials conditioned issuance of permits on prior agreement with the Washington State Department of Transportation for freeway improvements necessary to provide traffic access. The State insisted that the mall proponent pay 41% of the costs of the freeway work. "If we have to pay 41% . . . " Cafaro wrote, "this deal is dead." Pet. App. 9b.

[9] Cafaro Co. said that lack of "anchor tenants" (large retail concerns) was the key problem, Pet. App. 9b-11b. Cafaro Co. stated that if the necessary retail tenants could be found, it would start construction in spite of the zoning challenge. Pet. App. 12b.

[10] Pet. App. 22b.

4. There Were No "Straw Parties" To The Zoning Challenge And No Misconduct Before Any Tribunal.

A Spokane County zoning official approved an application to permit the construction of a one million square foot shopping mall on Petitioner's land. Darlene Compton, the Pleses and Larry Lyden (through his corporation, West 514, Inc.) urged the Spokane Board of County Commissioners to reverse that decision. When the Board of Commissioners refused, Compton, the Pleses, and Lyden filed a lawsuit (as authorized by state statute) for a writ of review. The suit was called *West 514, Inc., et al. v. Spokane County, et al.* The suit alleged the Spokane County Board of Commissioners had not adequately considered the objections that the proposed mall project would (1) cause deterioration of Spokane's downtown, and (2) cause harm to Spokane's sole source aquifer, over which it was proposed to be built.

The state superior court first reversed the Board of Commissioners' finding that the objecting parties lacked standing, and issued a writ of review. After plenary review, the superior court sustained the Board of Commissioners' decision to approve the project, in an unpublished order. The State Court of Appeals affirmed, in a published opinion.[11] All three of these opinions are set out in the Appendix hereto.

Compton, the Pleses, and Lyden had a strong personal interest in convincing the county government to

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[11] 53 Wn.App. 838, 770 P.2d 1065, *rev. denied*, 113 Wn.2d 1005, 777 P.2d 1050 (1989).

change its mind about permitting the mall project. It was undisputed that their petitions to the Spokane County Board of Commissioners, and, later, to the state court, were animated by concern about the effects of the proposed mall on the aquifer and on downtown Spokane, and by a strong desire to convince the county to preserve the *status quo.*[12]

By her own account,[13] Darlene Compton was deeply and increasingly concerned about the environmental implications of the proposed mall project. Orville Barnes told her of his opinion that the proposed mall would be harmful to downtown Spokane. This was Barnes' actual opinion,[14] not a "misstatement." Compton was also very worried about threats to water quality in the Spokane-Rathdrum aquifer. Though Compton later became torn between her environmental concerns and a desire to avoid the publicity engendered by the lawsuit which was later filed, it is undisputed that she actively participated in a hearing before the County Board of Commissioners and affirmatively decided to participate as a plaintiff in

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[12] Pet. App. 10a-11a. Although the Pleses had an economic interest in University City, Petitioner conceded before the state court that they were not for that reason disqualified from raising environmental objections.

[13] Darlene Compton was originally a defendant below. She was dismissed from the suit after furnishing the defendants with a sworn statement detailing her knowledge of events. It was to this statement that the Court of Appeals referred. Pet. App. 10a-11a.

[14] Barnes so testified before the Board of Commissioners. Later, one local newspaper independently weighed in with articles about the damage Cafaro Co. mall projects had done to downtowns in other cities.

the *West 514, Inc.* lawsuit. She did have discussions with her lawyers about whether to stay in the lawsuit, but it is undisputed that any instructions she gave to discontinue her involvement in the lawsuit came almost a year after May 13, 1987, the date upon which it is undisputed that, in Petitioner's words, the "window of opportunity" for the proposed mall closed.[15] It is also undisputed that the other plaintiffs in the *West 514, Inc.* case desired to change the county's decision, to forestall harm to the aquifer and to downtown Spokane's physical environment.

There were no settlement proposals from any party at any time, and therefore no improper failure to communicate settlement offers.[16] There was no evidence that the suit was "controlled" by third parties[17] nor that any false statement of any kind was ever made to any tribunal, nor that counsel for plaintiffs in *West 514, Inc.* did other than to ethically and zealously pursue the plaintiffs' cause of

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[15] There is a dispute of fact as to whether Ms. Compton clearly instructed her lawyers she had decided she no longer wished to participate (as she believes) or said that she was thinking it over (as her lawyer believes). That dispute is immaterial, however, as Ms. Compton states clearly that her instructions were given after the relevant time period for Petitioner's Claim. *See* Pet. App. 10a-11a.

[16] The attorney for plaintiffs in *West 514, Inc.* testified he'd been vaguely asked whether settlement should be discussed, but that no offers were made.

[17] Petitioner bases this claim on evidence that the *West 514, Inc.* lawyer sought Respondent University City's help in finding political allies against the proposal and that he verified with University City that he would be reimbursed if he advanced money to hire experts.

action for review of the Board of Commissioners' decision.[18]

5. The State Courts Did Not Find The *West 514, Inc.* Suit "Baseless."

The central factual claim in the Petition for Certiorari is the claim that the state court found the environmental claims "baseless." Pet. 11, 25.

The federal courts below correctly held that the state courts had made no such finding, and that there was no triable issue that the *West 514, Inc.* suit was meritorious. The state courts did *not* rule (though Petitioner asked them to[19]) that the "real issue" motivating the lawsuit was economic competition nor did they call the suit "baseless". The quotations from the state trial court opinion in the Petition are taken out of context.

The three opinions rendered in the state courts were, first, that the *West 514, Inc.* plaintiffs did have standing to challenge the action of the Board of County Commissioners in Superior Court, each having submitted affidavits establishing a threatened injury-in-fact. The state trial court referred to some of their evidence as "compelling" for purposes of standing to pursue environmental review,

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[18] Plaintiffs did not "protract" (Pet. 11) the litigation. The district court found it was undisputed the Cafaro Co. resisted efforts to speed up the case. Pet. App. 15b-17b.

[19] *See*, p. 11 *infra*.

and ordered that a discretionary writ of review issue, overruling Petitioner's objections.[20]

Second, the Superior Court entered a ten page opinion sustaining the Board of Commissioners' approval of the mall project. That opinion did not hold that the petition for review was "baseless." On the contrary the state trial court referred to the "wealth of opinion evidence on both sides of the issues",[21] and held that the Board of Commissioners was entitled to favor the evidence of the project's proponents over that of its opponents. The court said:

> Evidence need not be taken at face value. Part of the job of a trier of fact is to receive evidence and decide what weight, if any, is to be given to each exhibit and to the testimony of each witness. The Board did not, as plaintiffs allege, simply disregard the documents and witnesses plaintiffs presented. As fact-finder, the Board merely placed greater weight on other testimony, other documentary evidence. To do so was not contrary to law.[22]

The state trial court's reference in that opinion to "economic competition" refers not, as Petitioner implies, to some finding of personal ulterior motive, but rather to the specifics of Washington's State Environmental Policy Act (SEPA). Like its federal counterpart, SEPA requires an

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[20] *Appendix* pp. 3, 4.

[21] *Appendix* p. 13.

[22] *Appendix* p. 12. The Court of Appeals' affirmance similarly discussed the conflicting testimony and concluded the Board was entitled to put greater weight on the proponents' evidence. *Appendix* pp. 20-22, 27-28.

environmental impact statement if certain projects will affect the environment. The statute limits the concept of the "environment" to "the 'natural' and 'built' environment",[23] which doesn't cover purely social or economic impacts, except to the extent they affect the "natural" and "built" environment.

The mall opponents had urged the Board of Commissioners to consider (in an environmental study) whether the proposed mall would cause deterioration and blight in downtown Spokane. They produced an expert economist who testified that sales transfer from the downtown cores of other cities to regional malls had led to economic decline and, in turn, physical deterioration and blight in those downtowns. It is against this backdrop that a more complete excerpt of the state trial court's opinion must be considered:

> The Board of County Commissioners concluded that, since SEPA excludes considerations of financial profit or loss resulting from business competition or supply and demand aspects of a particular land use, they could not require that a supplemental EIS be prepared to provide information on the economic or socioeconomic consequences of the shopping center. In fact, the Board did have the benefit of the testimony of Mr. Greg Easton on that issue. His testimony was that the deterioration of a downtown business area may be due to several factors, one of which may be the economic competition of outlying shopping centers.

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[23] Wash. Rev. Code § 43.21C.110(f) (1983).

> WAC 197-11-449 (3) exempts "economic competition" and "profits" issues from the areas to be addressed in environmental impact statements. The legislature has restricted the use of SEPA to "natural" or "built" elements of the environment. RCW 43.21C.110(f). From the materials provided, it is clear that the intent of the legislature was to leave no doubt that concerns such as business competition or potential consumer flight from one commercial center to another was not an environmental consideration under SEPA.
>
> The body of material before the Board pertaining to the issue of economic blight is insufficient to allow any reasonable trier of fact to conclude that such a concern is based on anything more than speculation or conjecture. Moreover a review of that evidence leads the court to the inescapable conclusion that the real issue is just what the rules exclude from environmental consideration: economic competition. The Board's conclusion that a supplemental EIS on economic impact should not be required is not contrary to law.[24]

The Washington State Court of Appeals rejected the lower court's postulate that retail sales transfer is never relevant to show future deterioration and blight. However, it agreed that the mall opponents' proof was not strong enough:

> While loss of retail sales and resulting blight is a possibility, West 514 did not establish the probability or likelihood of this occurring in Spokane.

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[24] *Appendix*, pp. 8-9.

> The Board of County Commissioners was entitled to disregard Mr. Easton's general predictions as not relevant to the circumstances presented [because they were based on the experience of other cities having less viable downtowns than Spokane's]. Thus, we affirm the Board's determination that a supplemental EIS is not required on this issue. In so holding, we recognize that if the *probable* effect of competition is downtown blight such that the built environment is affected, then discussion of that effect in an EIS is called for.[25]

The state courts did not find *West 514, Inc.* baseless. They implicitly rejected Petitioner's arguments that the suit lacked any merit. Petitioner asked the Superior Court to refuse to issue a writ of review, calling the case "an improper attempt by merchants to use environmental laws to prevent competition in the marketplace and protect their vested economic interest." The Superior Court, however, overruled that objection on the strength of the

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[25] *Appendix*, p. 28 (parenthetical added) (emphasis in original). The State Court of Appeals decision is problematic. It means that an opponent must prove, to a high degree of probability, that an adverse environmental effect will flow from a project in order to justify an environmental impact statement, which is itself intended to study possible environmental impacts. Federal law sensibly requires a lower threshold probability to trigger a study of the environmental risk. *LaFlamme v. FERC*, 945 F.2d 1124, 1128 (9th Cir. 1991).

Petitioner offered no rebuttal to the affidavit of Professor Richard Settle, an authority on SEPA and author of *The Washington State Environmental Policy Act: A Legal and Policy Analysis* (Butterworth's Legal Publishers 1991), to the effect that the *West 514, Inc.* case was, in this particular, an unforeseeable, even "aberrational" development in Washington environmental law.

evidence before it and issued the writ of review. Ultimately of course, the court found for Petitioner, but only after an extensive review of the law and evidence led it to conclude the Board of Commissioners had discretion to rule as it had. *Appendix* pp. 5-14.

On appeal to the State Court of Appeals, Petitioner told that court that the *West 514, Inc.* plaintiffs were "major competitors of the project and are raising spurious environmental allegations in order to delay or defeat the project." The State Court of Appeals, too, declined the invitation to brand the appeal as "spurious", but on the contrary ruled for Petitioner only after it had carefully discussed the law and evidence in some detail. *Appendix* pp. 15-29.

Below, Petitioner offered no evidence to rebut the affidavit of Professor Richard Settle, an authority on the Washington State Environmental Policy Act (see note 25, *supra*), that the *West 514, Inc.* case was meritorious:

> Given the magnitude of the proposed Liberty Lake Mall (over 1 million square feet of floor space and parking for 4,550 vehicles), its location overlying the Rathdrum-Spokane aquifer, and the unknown effects of a storm runoff on hazardous leachate from the adjacent Greenacres land fill which had been placed on the EPA "superfund" list, a reasonably prudent person would conclude that the proposed mall crossed the threshold of significance according to all prior relevant court decisions. Under established SEPA case law, I would have predicted that all of the major SEPA arguments

relied upon by the petitioners would have succeeded. The petitioners clearly had a *bona fide* appeal under SEPA as construed by previous Washington case law.

Finally, while it was undisputed that Respondent University City had contributed funds to other groups which had brought environmental challenges to other proposed mall projects, it was also not disputed that those challenges were meritorious and "sincerely and ably" brought and pursued. There was no evidence that any project was prevented on account of any such lawsuit.

V. SUMMARY OF ARGUMENT.

This is not an appropriate case for review on *certiorari*. There are no issues or conflicts of federal law requiring clarification or decision by this Court, and the underlying factual issues were resolved against Petitioner.

VI. ARGUMENT.

A. There Are No Legal Issues Needing Resolution.

Question One in the Petition proposes that this Court decide a question "left open" in *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, ___ U.S. ___, 113 S.Ct. 1920 (1993), whether fraud on a court renders a lawsuit a sham. Pet. at 16. Petitioner's proposal that the Court consider this issue carries the dual implication (1) that there is some conflict or uncertainty in the lower

courts which requires resolution by this Court, and (2) that a resolution favorable to Petitioner will change the outcome in the present case. Neither implication is correct.

First, while this Court chose not to discuss the question in *Professional Real Estate Investors*, it is not an "open question" in the lower courts whether a fraudulent lawsuit is a sham. In the Ninth Circuit's *Professional Real Estate Investors* opinion, reported at 944 F.2d 1525 (9th Cir. 1991), that court held that:

> If a litigant procures a favorable judgment through misrepresentations or other unethical conduct, the success of the lawsuit would not shield the litigant from the antitrust laws.

944 F.2d at 1531 n. 7.

There is no conflict among the circuits which have decided this point.[26]

Petitioner's second implicit proposition, that a favorable decision by this Court on the question posed will change the outcome, is also incorrect. The 9th Circuit adhered in this case to its precedent on fraud and misrepresentation. The court stated (in reference to this Court's opinion in *Professional Real Estate Investors*):

> Read in context with the entire *Professional Real Estate Investors* opinion, footnote 6 does not

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[26] *See, e.g., Opdyke Investment Company v. City of Detroit*, 883 F.2d 1265, 1273 (6th Cir. 1989); *St. Joseph's Hospital v. Hospital Corp. of America*, 795 F.2d 948, 954-55, *reh. denied*, 801 F.2d 404 (4th Cir. 1986); *Hufsmith v. Weaver*, 817 F.2d 455, 459 (8th Cir. 1987).

> obviate application of the Court's two-part test for determining sham litigation *in the absence of proof that a party's knowing fraud upon, or its intentional misrepresentations to the court deprive the litigation of its legitimacy.*
>
> No such scenario is presented in this case.

Pet. App. 10a (emphasis added).

Petitioner thus had the full benefit below of the rule it urges here. Indeed, Respondents have never contended the law is otherwise. Were this Court to affirm, as Petitioner asks, that that is the law, it would affirm the lower court's opinion.

B. The Underlying Factual Claims Were All Resolved Against Petitioner.

Question Two in the Petitioner depends upon assertions of fact on which both lower courts held Petitioner failed to produce any evidence to create a triable issue. This Court has stated that it generally does not sit to review the sufficiency of factual determinations in individual cases, particularly where the opinions of the district court and court of appeals concur on the evidentiary issues. *See General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 178 (1938). There is no need for such review here.

Respondents moved for summary judgment a year and a half after the case was begun. The motion was not decided for another ten months. During that period, Petitioner simply failed to carry its relatively light burden, as the non-moving party, of producing evidence establishing the existence of triable issues of fact on the key elements

of its case, upon which it bore the burden of going forward. After the district court granted summary judgment, Petitioner was entitled to, and was afforded, *de novo* review in the Court of Appeals. That court correctly applied the legal standard favored by Petitioner (as had the district court, Pet. App. 246-256) that a fraudulent lawsuit would constitute a sham. But the Court of Appeals agreed with the district court, on review of the whole record that:

> No such scenario is presented in this case . . . [Petitioner's] evidence at most goes to [Respondent's] motivation, which we are precluded from examining. *Professional Real Estate Investors*, ___ U.S. ___, 113 S.Ct. at 1928.[27]

There is no need for this Court to conduct a third *de novo* review of the record.

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[27] Pet. App. 10a-11a (parenthetical added).

VII. CONCLUSION.

The four courts (two state courts, and the two federal courts below) have rejected Petitioner's claim that the *West 514, Inc.* suit was "baseless." The Petition for Writ of Certiorari should be denied.

Respectfully submitted this 5th day of July, 1994.

ROBERT B. HENDERSON
HENDERSON AND KALAMON, P.C.
1017 Washington Mutual Building
Spokane, WA 99201
(509) 623-2900

Counsel for Respondents Barnes and McCarthy Management, Inc.

LESLIE R. WEATHERHEAD
WITHERSPOON, KELLEY, DAVENPORT & TOOLE
1100 U.S. Bank Building
Spokane, WA 99201
(509) 624-5265

Counsel for Respondents Magnuson, Plese and University City, Inc.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF SPOKANE

WEST 514, INC., a corporation, et al, Plaintiffs vs. COUNTY OF SPOKANE, a municipal corporation, et al, Defendants	)	No. 87-2-01106-7 MEMORANDUM DECISION

The sole issue presented in this hearing on Plaintiffs' Order to Show Cause is whether plaintiffs have standing to challenge the decision of the Board of County Commissioners. Standing is conferred on "persons aggrieved" by an action of the board. The court must find, (1) the person is likely to suffer a specific, perceived injury in fact, and (2) that the injury falls within the zone of interest of the State Environmental Policy Act.

Case law requires that the "injury in fact" be more than hypothetical or conjectural damages, more than an exercise of the conceivable. Yet common sense decrees proof that the project is *likely* to cause a specific, identifiable injury to plaintiff is sufficient to meet the "injury in fact" requirement. After all, the claim of injury is based upon the occurrence of a future event, the building of the proposed project. Defendants argue for a higher standard of certainty. Under the circumstances, likelihood or probability must suffice.

The "zone of interest" protected or regulated by the State Environmental Policy Act would seem to be limited to "natural" or "built" elements of the environment. Air and water quality, health and quality of life concerns fall within that "zone of interest."

Dr. Esvelt's February 19, 1987 Review (p.2 #8) points out,

> Public drinking water supply wells are immediately downgradient of the Liberty Lake Mall area. The Aquifer transports any pollutants toward these water supplies. Facilities include those of Consolidated Irrigation District, Vera Water and Power, Modern Water Company, Model Electric Water Company, East Spokane Water District, Orchard Avenue Irrigation District, Irving Water District, the City of Millwood and the City of Spokane.

The project in question is located directly over Spokane's sole source aquifer. The site is within the boundaries of what the 208 Aquifer Water Quality Management Plan calls an "Aquifer Sensitive Area." The project proposes to dispose of water that accumulates on its 97 acre facility onto a grassy area at the west end of the project where it will collect, seep into the soil and join the aquifer.

Dr. Esvelt explains that toxic substances from the Greenacres Landfill, .3 mile south of the project site, have already caused a degradation of water quality in the Jeffers Well, just west of the westerly perimeter of the project site:

> It is established that the Aquifer in the vicinity of the Jeffers well is contaminated with toxicants, apparently from leachate originating in the Greenacres Landfill. Transport of these contaminants is probably toward public water supplies. *Discharge of additional stormwaters or other surface waters in this vicinity may increase the rate of transport, or may shift the route to affect public drinking water supplies* . . . The proposed Grass Percolation Areas for stormwater injection from the Mall appear to be in the immediate proximity of the Jeffers well. (February 18, 1987, Review, p. 6, emphasis added.)

Soil and ground water contamination in the area a stone's throw west of the site are well documented. Dr. Esvelt's reports provide compelling evidence that the mall's injection of storm water will flush the already present toxic pollutants faster and further west along the aquifer. It will introduce additional nitrogen, phosphorus compounds, heavy metals such as arsenic, cadmium, chromium, copper, lead, zinc, and nickel to the soil. These pollutants are similar to those present in municipal sewage. Plaintiffs, according to their affidavits, rely upon the aquifer Dr. Esvelt says the mall will contaminate as their sole source of healthy, pure drinking water. So do virtually every other citizen of Spokane and the Spokane valley.

Both Darlene Compton and Mr. and Mrs. Plese drink water from wells within the first-to-be-affected area. If Dr. Esvelt is correct that the mall will speed the migration of contaminants toward their wells, these plaintiffs have demonstrated an injury in fact within the zone of interest of the State Environmental Policy Act. West 512, Inc., who

operate Flaherty's Tavern in downtown Spokane, is several miles down the aquifer. Dr. Esvelt's reports indicate that the proposed project threatens Spokane water.

Plaintiffs have urged the court to consider the negative economic impact on the downtown Spokane which would flow from the proposed mall. WAC 197-11-449 (3) exempts "economic competition" and "profits" issues from the areas to be addressed in *environmental impact statements*. SEPA, however, "contemplates that the general welfare, social, *economic*, and other requirements and essential considerations of state policy will be taken into account in weighing and balancing alternatives." WAC 197-11-448 (1). It is clear that, in addition to information included in environmental impact statements, the economic impact of such a project on Spokane county, the City of Spokane, the downtown business district, can and should be considered by the decision makers. Economics too is within the zone of interest of SEPA. Plaintiffs have demonstrated the likelihood of injury in fact on that issue as well.

Plaintiffs' affidavits, considered with Dr. Larry A. Esvelt's two documents entitled Liberty Lake Mall Environmental Review, persuade the court that plaintiffs have met their burden of proof. They have standing to challenge the Board's action. The Writ of Review shall issue.

DATED this third day of June, 1987.

MICHAEL E. DONOHUE
MICHAEL E. DONOHUE
Superior Court Judge

SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF SPOKANE

WEST 514, INC., a corporation; ANTONE PLESE and SUNDENE PLESE, husband and wife; and DARLENE COMPTON, Plaintiffs, v. COUNTY OF SPOKANE, a municipal corporation; THE CAFARO CO., a foreign corporation; LIBERTY LAKE INVESTMENTS, INC., a Washington corporation; WELLS B. McCURDY, Trustee; JOHN and JANE DOES 1-50, Trust Beneficiaries to a certain Declaration of Trust dated July 27, 1976, as designated in a Deed of Trust recorded at Volume 753, page 1718 of Official Records of the Offices of the County Auditor for Spokane County, Defendants	NO. 87-2-01106-7 MEMORANDUM DECISION

The governmental bodies responsible for setting environmental policy and for environmental decision-making for unincorporated areas of Spokane County are the Spokane County Planning Department and, ultimately, and Board of County Commissioners. They do so within a framework of federal and state constitutions and statutes, administrative codes, and case law.

The court may not substitute its opinion regarding environmental policy for those of the elected officials charged with that duty. To do so would be a usurpation of the authority of the other branches of government, executive and legislative, and an abuse of the power of the courts.

These limitations on the power of the judicial branch are proper. The executive branch agencies possess environmental expertise the courts do not attain. They are called upon to interpret and carry out the State Environmental Policy Act. They are in the best position to determine the credibility of witnesses. Witnesses actually appeared before those agencies; court review of environmental decisions is based only upon a written record. When the court is asked to review a decision of the Board under SEPA, state law requires that the expertise of the executive branch environmental experts and policy makers be considered.

> In any action involving an attack on a determination by a governmental agency relative to the requirement or absence of the requirement or the adequacy of a 'detailed statement' the decision of the governmental agency shall be afforded substantial weight.

RCW 43.21c.090.

SEPA requires that "An environmental impact statement is required for major actions significantly affecting the quality of the environment." RCW 43.21C.030(2)(c). This requirement that the governmental body be provided a detailed statement of the project's likely effect on the environment is to insure that environmental matters are given proper consideration during decision making.

In 1987 the Spokane County Planning Department considered the Liberty Lake Mall project. Since a 1978 EIS for the Highlands had already been prepared, they elected to adopt a mitigated determination of non-significance (MDNS) rather than to require a new or supplemental EIS. They approved relevant portions of the 1978 EIS, and required the applicant to comply with additional requirements in four areas of concern: (1) traffic circulation, (2) air quality, (3) storm and flood water runoff, and (4) possible flooding in a 100-year flood. Once the applicant submitted proposals addressing those problem areas, and the department concluded that the evaluation of these proposals would be a continuing and ongoing project, the department concluded that the MDNS could be issued with the information available. It was circulated to 22 agencies, and the agency comments were made a condition of project approval.

Defendants allege that the record amply demonstrates that the potential impacts arising from the 1987 project were reasonably evaluated, and that a supplemental EIS was unnecessary. Plaintiffs assert that the Board's failure to consider evidence regarding possible economic blight, and their decision to issue the MDNS before complete traffic circulation or air quality information was available was contrary to law. They further allege the record reveals environmental changes in the 9-years since the 1978 EIS that are not adequately addressed by the MDNS. They argue that these amount to "new information" or "substantial changes" requiring a new or supplemental EIS.

The burden is upon the one attacking a governmental body's finding of "non-significance" that the action is

contrary to law or that the findings are clearly erroneous in view of the entire record as submitted and the public policy contained in SEPA.

WAS THE BOARD's DECISION CONTRARY TO LAW?

The Board of County Commissioners concluded that, since SEPA excludes considerations of financial profit or loss resulting from business competition or supply and demand aspects of a particular land use, they could not require that a supplemental EIS be prepared to provide information on the economic or socioeconomic consequences of the shopping center. In fact, the Board did have the benefit of the testimony of Mr. Greg Easton on that issue. His testimony was that the deterioration of a downtown business area may be due to several factors, one of which may be the economic competition of outlying shopping centers.

WAC 197-11-449 (3) exempts "economic competition" and "profits" issues from the areas to be addressed in environmental impact statements. The legislature has restricted the use of SEPA to "natural" or "built" elements of the environment. RCW 43.21C.110(f). From the materials provided, it is clear that the intent of the legislature was to leave no doubt that concerns such as business competition or potential consumer flight from one commercial center to another was not an environmental consideration under SEPA.

The body of material before the Board pertaining to the issue of economic blight is insufficient to allow any reasonable trier of fact to conclude that such a concern is based on anything more than speculation or conjecture.

Moreover a review of that evidence leads the court to the inescapable conclusion that the real issue is just what the rules exclude from environmental consideration: economic competition. The Board's conclusion that a supplemental EIS on economic impact should not be required is not contrary to law.

The Board approved the issuance of a Mitigated Determination of Non-Significance on this site plan and proposal. Under WAC 197-11-350 setting out the MDNS process,

> The purpose of this section is to allow clarifications or changes to a proposal prior to making the threshold determination.
>
> (1) In making special determinations, an agency may consider mitigating measures that the agency or applicant will implement.

The record reveals that the Board had before it certain air quality, traffic circulation, and storm and flood water impact information, but that they chose to approve the issuance of the MDNS before all air quality studies had been completed, before "208" proposals had been reduced to writing, and before final evaluation of traffic impacts. Among the mitigating conditions required to be done in the future, as set forth in the MDNS, were (1) an air quality monitoring program, (2) a detailed traffic circulation plan, and (3) a drainage plan dealing with storm and flood waters.

Plaintiffs complain that the Board, by relying on incomplete information contained in draft, preliminary, and pending studies, precluded citizen comment and

evaluation. Plaintiffs claim that the Board's action conflicts with WAC 197-11-660(1)(a), which provides that mitigating measures must be based on plans "in effect when the DNS or DEIS is issued."

A review of environmental case law sheds light on the interpretation of that code section. The use of preliminary plans combined with a mitigating requirement that the plans be completed in the future has been approved by the courts in reviewing SEPA and the Washington Administrative Code environmental regulations. *Preliminary* surface drainage plans were part of the MDNS's mitigating measures in *Murden Cove v. Kitsap County,* 41 Wn.App. 515, 704 P.2d 1242 (1985). In another case, the court held that such a procedure was prudent and reasonable.

> While appellants challenge the procedure used by the City Engineer, under the circumstances the procedure appears to us as eminently sensible. Where it is feasible, it appears reasonable to resolve potential environmental problems before formal application is made for a building permit. The pertinent question is whether environmental factors were adequately considered before a final decision was made.

Hayden v. Port Townsend, 93 Wn.2d 870, 613 P.2d 1164 (1980) (reversed on other grounds by *Sane v. Seattle,* 101 Wn.2d 280, 676 P.2d 1006 (1984)). Conditioning a project upon compliance with mitigating measures is a proper act for environmental decision maker to take. WAC 197-11-350; *Brown v. Tacoma,* 30 Wn.2d 762, 637 P.2d 1005 (1981). To require completion of air, traffic, and water

studies as a mitigating condition in an MDNS was not contrary to law.

As part of the procedure leading up to the issuance of the MDNS, the Board adopted portions of the Draft EIS and Final EIS prepared for the 1978 Highlands project. Those portions dealt with impacts of the business park, office park and shopping center which had been planned for the same site. Further, the Planning Department required the applicant to submit an expanded environmental checklist on the 1987 project.

WAC 197-11-600 (3) sets limits on the use of a former EIS for a subsequent project proposal.

> Other agencies acting on the same proposal shall use an environmental document unchanged, except in the following cases:
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> * * *
>
> (b) for DNSs and EISs, preparation of a new threshold determination or supplemental EIS is required if there are:
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> (i) Substantial changes to a proposal so that the proposal is likely to have a significant adverse impact . . . or,
>
> (ii) New information indicating a proposal's probable significant adverse environmental impacts. A new threshold determination or SEIS is not required if probable significant adverse environmental impacts are covered by the range of alternatives and impacts analyzed in existing environmental documents.

Regarding (i), above, the Board reviewed the evidence and determined that the 1987 proposal's impact on

the air quality, traffic circulation, and water quality would be less than the impact of the Highlands proposal of 1978.

In *SEAPAC v. Cammack II Orchards*, 49 Wn.App. 609, ___ P.2d ___ (1987), the court considered whether a supplemental EIS was required.

> An action which does not have an environmental impact substantially different from an earlier proposed action does not require either a new threshold determination, or a supplemental draft or final environmental impact statement. In the instant case, the subsequent proposal impacted the environment less than the original expanded application.

As to WAC 197-11-600(3)(ii), above, it is clear that the Board evaluated the information regarding the Greenacres landfill being placed on the superfund list in 1980, the problems with the Jeffers well, and Dr. Esvelt's studies and testimony before reaching its final decision. The Board determined that the Greenacres Landfill site was adequately discussed in the 1978 EIS, and that the concerns raised by the testimony of Dr. Esvelt and Engineer Kennedy do not create "substantial changes" or "new information".

Evidence need not be taken at face value. Part of the job of a trier of fact is to receive evidence and to decide what weight, if any, is to be given to each exhibit and to the testimony of each witness. The Board did not, as plaintiffs allege, simply disregard the documents and witnesses plaintiffs presented. As fact-finder, the Board merely placed greater weight on other testimony, other documentary evidence. To do so was not contrary to law.

WERE THE FINDINGS OF THE BOARD CLEARLY ERRONEOUS?

> A finding is 'clearly erroneous' when, although there is evidence to support, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

Murden Cove v. Kitsap County 41 Wn.App. 515, 523, 704 P.2d 1242 (1985). The court is charged with the duty to examine the environmental documents and determine whether the environmental effects of the proposed action are disclosed, discussed, and substantiated by opinion and data. *Mentor v. Kitsap County,* 22 Wn.App 285, 289, 582 P.2d 1226 (1978). If the court finds that the decision of the Board of County Commissioners approving the department's decision was clearly erroneous, and that it is probable that the proposed action will have more than a moderate effect on the environment, the court can order that an environmental impact statement (EIS) be issued. If the Board action was not clearly erroneous or, more likely than not, the proposed action will have a moderate effect or less on the environment, the court cannot order that an EIS be prepared.

In connection with a review of the entire record, including all exhibits, of the Board of County Commissioners, the court has examined each of the environmental documents as required. It is clear from the record that the environmental effects of the proposed action were disclosed, discussed, and substantiated by opinion and data. There was a wealth of opinion evidence on both sides of the issues. The opinion testimony relied upon by

plaintiffs was couched in terms of possibility. For example, Dr. Esvelt told the Board that the water runoff from the proposed mall "may" or "could" speed migration or change the course of leachates from the Greenacres landfill toward the aquifer. The opinions fall far short of scientific probability or likelihood. When viewed in the context of the entire record, in light of the public policy enunciated in SEPA, those opinions are not persuasive.

The record does not leave the court with a firm conviction that a mistake has been committed. The decision of the Board was not clearly erroneous and must be affirmed.

DATED: March 7, 1988.

/s/ Michael E. Donohue
MICHAEL E. DONOHUE
Judge, Department 9

[No. 9314-0-III. Division Three. April 13, 1989.]

WEST 514, INC., ET AL,
Appellants, v. THE COUNTY OF SPOKANE,
ET AL, *Respondents*.

Nature of Action: Action seeking judicial review of a county's approval of a site development plan for a shopping mall. The county did not require the developer to supplement an environmental impact statement prepared 9 years earlier for a different proposal at the site.

Superior Court: The Superior Court for Spokane County, No. 87-2-01106-7, Michael E. Donohue, J., on April 19, 1988, entered a judgment upholding the county's approval of the plan.

Court of Appeals: Holding that the existing statement was adequate for reviewing the environmental impact of the shopping mall and that the county planning department had sufficiently considered environmental factors before issuing a mitigated determination of nonsignificance, the court *affirms* the judgment.

Randall Gaylord, William Symmes, and *Witherspoon, Kelley, Davenport & Toole,* for appellants.

Donald C. Brockett, Prosecuting Attorney, and *James Emacio, Chief Civil Deputy; Stanley Schultz, Winston & Cashatt, Gerald Neal,* and *Lukins & Annis,* for respondents.

Wells B. McCurdy, pro se.

THOMPSON, C.J. – West 514, Inc., Antone and Sundena Plese, and Darlene Compton[1] (hereafter referred to as West 514) appeal a superior court judgment on writ of certiorari. The judgment affirmed the decision of the Spokane County Board of Commissioners to approve defendant Cafaro Company's site development plan for a proposed retail shopping mall in the Liberty Lake area.[2] In evaluating the effect of the mall on the environment, the Board utilized a 1978 environmental impact statement (EIS) prepared for a different proposal on the same site. The primary issue is whether the Board should have required a supplemental EIS under WAC 197-11-600, promulgated pursuant to RCW 43.21C, the State Environmental Protection Act of 1971 (SEPA). That regulation provides:

> (4) Existing documents may be used for a proposal by employing one or more of the following methods:
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> . . .
>
> (d) Preparation of a SEIS [supplemental EIS] if there are:
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> (i) Substantial changes so that the proposal is likely to have significant adverse environmental impacts; or

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[1] West 514, Inc., is a corporation doing business as Flaherty's Restaurant in downtown Spokane. Darlene Compton is a co-owner of the property West 514, Inc., leases for its business. Antone and Sundena Plese are property owners in and residents of Liberty Lake, Washington.

[2] The remaining defendant, Liberty Lake Investments, Inc., holds a deed of trust on the property which is the subject of the proposal.

(ii) New information indicating a proposal's probable significant adverse environmental impacts.

We affirm.

In 1978, the sponsor of a project entitled "The Highlands" obtained a rezone of the subject property for restricted industrial and commercial use. The Highlands proposal involved 800 acres and included plans for a 700-acre residential development, a 29-acre community shopping center with a building area of 128,000 square feet, a 20-acre office park, and an 80-acre business park. In 1981, the sponsor submitted a request for a boundary line adjustment. The commercial zone was increased, but, as a condition to the change, the sponsor was required to submit site development plans for public hearing prior to the issuance of a building permit. For reasons not apparent in the record, the Highlands project was not pursued.

In 1986, Cafaro Company submitted its site development plan for approval. The proposed plan is for a regional shopping center covering 97 acres with a building area in excess of 1 million square feet and parking for 4,550 vehicles. The plans include widening Liberty Lake Road, constructing a new 4-lane road along the southern perimeter of the property, and improving the Harvard Road interchange and the Greenacres interchange to Interstate 90.

On December 23, 1986, the Spokane County Planning Department, in considering the Cafaro site development plan, adopted both the draft EIS and the final EIS prepared in 1978 for the Highlands project and also entered a

mitigated determination of nonsignificance (MDNS). The MDNS stated:

> The lead agency [Spokane County Planning Department] for this proposal has determined that it does not have a probable significant adverse impact on the environment if mitigated as stipulated below. An Environmental Impact Statement (EIS) is *not* required under RCW 43.21C.030(2)(c). This decision was made after review of a completed environmental checklist and other information on file with the lead agency. . . .
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> There are four areas of concern in the development of the Liberty Lake site. . . .
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> 1) A background and continued air quality monitoring program. . . .
>
> 2) A detailed traffic and circulation plan. . . .
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> 3) A drainage plan dealing with '208' design concepts on-site and the off-site drainage disposal for flood waters as identified by the 100-year Flood Hazard Area. . . . ['208' refers to the report of the Spokane County Water Quality Management Program on its investigation of the Spokane-Rathdrum Prairie Aquifer.]
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> 4) Development in substantial conformance with the submitted site plan except as may be modified by the above studies. . . .

At a public hearing on January 8, 1987, the Spokane County Hearing Examiner concurred with the Planning Department's decision and approved the site development plan.

West 514 appealed this decision to the Spokane County Board of Commissioners which held a de novo hearing on February 19, 1987. At the hearing, West 514 presented the testimony of Dr. Larry Esvelt of Esvelt Environmental Engineering concerning the impact of the proposed mall on water quality. He pointed out that while the 1978 EIS acknowledged that the closed Greenacres Landfill, located immediately southwest of the project, was a "potential aquifer water quality factor", since that time the landfill has been confirmed as a major source of contaminants and placed on the National Priorities List of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (Superfund).

Dr. Esvelt expressed two concerns about the effect of runoff from the mall on water quality. First, "the injection of water at this site is going to increase . . . the water flow in ground water through the area we know is already contaminated by the Greenacres Landfill." Dr. Esvelt was referring to the fact that at least one water source downgradient from the landfill (the Jeffers well) had been identified as containing leachate[3] from the landfill. He testified: "My feeling is that this project could affect . . . methods for cleanup [of the landfill] and we don't know what they're going to be, but it could impact them by spreading the contaminant beyond where they are now . . . "

Second, there are nutrients and toxic metals present in storm water runoff which also pose a threat to the aquifer. The proposal calls for the runoff to be filtered

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[3] Liquid that percolates through soil or other medium.

through a grass percolation area. According to Dr. Esvelt, the efficiency of grass percolation areas has not been documented. He also submitted a written report to the Board in which he stated that "[i]nstallation of stormwater conveyance to another location, such as the Spokane River, should be considered . . . "

In response, Michael Kennedy, consulting engineer to the Cafaro Company, testified that the project met the drainage treatment requirements of Spokane County's Water Quality Management Plan. He stated that any leachate from the landfill would not flow in the direction of the grass percolation area.

West 514 also presented the testimony of Greg Easton, a consulting economist. He reviewed the experience of Tacoma, Everett, Olympia and Seattle and concluded that regional shopping malls had caused a decline in retail sales in the central business districts in those cities. Further, "the loss of retail sales has been accompanied in some instances . . . by, losses of, major office tenants and accompanied in many cases by deterioration of the physical environment". In response to questioning, he admitted Spokane's downtown area was more viable than those of Tacoma, etc. However, he also predicted that the region could not in the near future generate enough retail dollars to support both the new mall and the existing retail shopping sites. Paul Richley of the Cafaro Company countered that the mall would draw shoppers from a wider area and, therefore, the share of the "pie" would not necessarily be reduced.

Witnesses for the Cafaro Company compared other aspects of the current proposal with the 1978 project. Ron

Kirkwood, an engineer and vice-president of development for the Cafaro Company, compared the road systems of the two projects, and stated they were very similar but that Cafaro's proposal was a refinement of the first plan and would eliminate traffic stalling. Another engineer, Glen O'Dell, compared the air quality impacts of the two projects. He testified that presently carbon monoxide levels at the site average 2.5 parts per million cubic feet of air. The 1978 project would have raised that average to 10 to 13 parts per million, but his computer analysis of the impact of the present proposal predicts a level of 7 to 8 parts per million. Federal and state standards call for no more than 9 parts per million.

The Board's findings may be summarized as follows:

1. The Greenacres Landfill was adequately discussed in the 1978 EIS. With respect to Dr. Esvelt's comments that it is difficult to predict what will happen at the landfill as a result of its placement on the federal Superfund toxic waste cleanup list, the Board noted that placement on the list requires responsible parties to take appropriate action in light of surrounding land uses, including the proposal. The Board also cited Engineer Kennedy's testimony that drainage from the landfill will not be affected by the proposed storm water drainage basin for the project.

2. Economic or socioeconomic consequences of a shopping center cannot be the basis for the requirement of an EIS.

3. Allegations of toxic substances in storm water runoff and allegations of the limited success of "208 storm water methods" are not "new information" under

WAC 179-11-600 so as to require a supplemental EIS. The new project is subject to 208 water quality management provisions which requires more stringent standards than the 1978 project.

4. The impacts due to road construction and air quality are less than those predicted in the prior EIS. The condition of approval requiring air quality monitoring and modeling is a mitigating condition which when met will confirm that the project will not have a significant adverse environmental impact.

West 514 appealed the Board's decision, assigning error to the above findings. On April 19, 1988, the Superior Court entered a judgment which affirmed the decision of the Board of Commissioners approving Cafaro's site development plan.

The sole issue is whether the Board's decision is clearly erroneous. *Asarco Inc. v. Air Quality Coalition*, 92 Wn.2d 685, 700, 601 P.2d 501 (1979); *Norway Hill Preserv. & Protec. Ass'n v. King Cy. Coun.*, 87 Wn.2d 267, 275, 552 P.2d 674 (1976). Under this standard, agency action may be reversed when the reviewing court is firmly convinced in light of the record and the public policy contained in

RCW 43.21C.010[4] that a mistake has been committed.[5] *Nisqually Delta Ass'n v. DuPont*, 103 Wn.2d 720, 725-26, 696 P.2d 1222 (1985); *Asarco Inc. v. Air Quality Coalition*,

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[4] RCW 43.21C.101 states:

"The purposes of this chapter are: (1) to declare a state policy which will encourage productive and enjoyable harmony between man and his environment; (2) to promote efforts which will prevent or eliminate damage to the environment and biosphere; (3) and stimulate the health and welfare of man; and (4) to enrich the understanding of the ecological systems and natural resources important to the state and nation."

[5] In applying the standard here, two subissues are presented concerning what constitutes the record. First, West 514 assigns error to that portion of the Superior Court's memorandum opinion in which the judge stated that the testimony of the mall opponents fell short of showing to a scientific probability or likelihood that the proposed project would have more than a moderate environmental impact. It argues that the Superior Court held them to a more onerous standard than that of RCW 43.21C.031, which requires an environmental impact statement for all proposals having a *probable, significant, adverse environmental impact*. The language used by the Superior Court is irrelevant to this court's review. It is clear that this court applies the "clearly erroneous" standard *directly* to the challenged *administrative* decision. *Nisqually Delta Ass'n v. DuPont*, 103 Wn.2d 720, 696 P.2d 1222 (1985). To the extent that West 514's challenge to the "scientific probability" language of the Superior Court also involves a challenge to the Board of Commissioners' finding the proposal had no significant adverse environmental impact, it will be discussed below.

Second, West 514 contends the record should include four documents which Dr. Esvelt referenced in his report to the Board. While the Board received a copy of Dr. Esvelt's report, they did not receive copies of the four documents. Dr. Esvelt's report merely states that it is based upon those four documents. We agree with the Superior Court that the documents were not before the Board of Commissioners, and, thus, cannot be considered.

supra at 700. In such reviews, the court recognizes and defers to the expertise of the administrative agency. *Nisqually;* RCW 43.21C.090.

First, West 514 contends that Dr. Esvelt's testimony about the impact of the mall on water quality constitutes "new information" under WAC 197-11-600 and, therefore, a supplemental EIS is required.

WAC 197-11-600(4)(d)(ii) states a supplemental EIS should be prepared if there is "[n]ew information indicating a proposal's *probable significant* adverse environmental impacts". (Italics ours.) While "probable" is used to distinguish likely impacts from those that are remote or speculative, it "is not meant as a strict statistical probability test". WAC 197-11-782. "Significant" involves context and intensity. "An impact may be significant if its chance of occurrence is not great, but the resulting environmental impact would be severe if it occurred." WAC 197-11-794(2).

In *Barrie v. Kitsap Cy. Boundary Review Bd.*, 97 Wn.2d 232, 235, 643 P.2d 433 (1982), the court noted that passage of time alone is not "significant new information", and the lead agency must determine whether the new information is significant. It quoted the discussion of what is significant contained in *National Indian Youth Coun. v. Andrus*, 501 F. Supp. 649, 663-64 (D.N.M. 1980), *aff'd sub nom. National Indian Youth Coun. v. Watt*, 664 F.2d 220 (10th Cir. 1981):

> Any project . . . will, undoubtedly, generate "information" as it progresses. . . . [I]n order for "new circumstances or information" to attain the status of "significant" these must reach that

> level where, reasonably, it becomes necessary to focus attention once more upon the environmental aspects of a project. . . . An otherwise unguarded reading of this subpart could unleash a procedural plague . . .

Barrie, at 235-36. Further, "every remote and speculative consequence of an action [need not] be included in the EIS." *Cheney v. Mountlake Terrace*, 87 Wn.2d 338, 344, 552 P.2d 184 (1976).

Here, Dr. Esvelt raised concerns about the proximity of the Greenacres Landfill and predicted that runoff from the mall "could" affect methods for cleanup of the landfill. On the other hand, he admitted that runoff from the mall and leachate from the landfill would remain completely separate until reaching the aquifer.

This testimony does not constitute significant new information. The Greenacres Landfill and its potential for contaminating sources of drinking water existed in 1978. In the prior EIS, W.R. Dobratz of the county engineering department commented that "[t]he old landfill area should not be used for subsurface wastewater or storm water disposal . . . because of possible leachate problems". The subsequent identification of contaminants in the Jeffers well and the placement of the landfill on the Superfund cleanup list are developments that could be expected to occur with the passage of time. Finally, Dr. Esvelt's opinion that runoff from the mall "could" affect methods of cleanup of the landfill is too speculative to require a supplemental EIS.

Dr. Esvelt also expressed doubts concerning the effectiveness of grass percolation areas as a means of

disposing of storm water runoff. But again, the 1978 EIS, in the response to comment 13, recognized that runoff water contains contaminants and considered the problem of effectively removing those contaminants. The Highlands project proposed to inject runoff directly into dry wells. Dr. Esvelt did not suggest that the grass percolation areas of the current proposal posed a greater impact.

Accordingly, we affirm the Board's determination that the 1978 EIS was adequate for reviewing the impact of the proposed mall on water quality.

Second, West 514 argues that Mr. Easton's testimony about the effect of regional malls on central business districts is evidence that the proposed mall is a "substantial change" "likely to have significant adverse . . . impacts" on the environment of downtown Spokane. Under WAC 197-11-600(4)(d)(i), such a change, if proven, requires preparation of a supplemental EIS. *See also Save a Neighborhood Env't v. Seattle*, 101 Wn.2d 280, 284, 676 P.2d 1006 (1984); *SEAPC v. Cammack II Orchards*, 49 Wn. App. 609, 613, 744 P.2d 1101 (1987).

Much of Mr. Easton's testimony is general in nature. He gave Olympia, Everett and Tacoma as examples of cities in which central business districts had suffered physical deterioration as the result of competition from regional malls. Yet he conceded that the experience of those cities might not be relevant to Spokane because Spokane has a more viable downtown.

There is no doubt that a large mall in the Liberty Lake area will compete economically with downtown Spokane as well as other area retail centers. But economic competition, in and of itself, is not an environmental

effect and need not be discussed in an EIS. WAC 197-11-448(3). What is missing here is evidence that the proposed mall is likely to have a significant adverse impact on the *physical* environment of downtown Spokane. While loss of retail sales and resulting blight is a possibility, West 514 did not establish the probability or likelihood of this occurring in Spokane. The Board of County Commissioners was entitled to disregard Mr. Easton's general predictions as not relevant to the circumstances presented. Thus, we affirm the Board's determination that a supplemental EIS is not required on this issue. In so holding, we recognize that if the *probable* effect of competition is downtown blight such that the built environment is affected, then discussion of that effect in an EIS is called for. RCW 43.21C.030(2); WAC 197-11-444(2).[6]

Third, West 514 asserts it was error for the Spokane County Planning Department to issue the MDNS. It

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[6] Kenneth S. Weiner, special counsel to the Commission on Environmental Quality, said in his section-by-section analysis of the 1983 amendments to SEPA:

> Traditional areas of concern which would clearly be covered by this section [RCW 43.21C.110(f)] include . . . the problems of blight of downtown and urban areas which would be caused by proposed actions.

Weiner, *Section-By-Section Summary of S.S.B. 3006*, at 195, in R. Settle, *Washington Land Use and Environmental Law and Practice* (1983). *See also* Rodgers, *The Washington Environmental Policy Act*, 60 Wash. L. Rev. 33, 51 (1984) (neither the Legislature nor the WACs eliminate entirely the obligation to consider and discuss socioeconomic effects); Washington State Bar Ass'n, *Major Changes Under the New SEPA Rules-1984*, Second Environmental and Land Use Law Section Mid-Year Meeting and Seminars 3-1, at 3-23 (1984).

described the MDNS as conditioned on future environmental studies which in and of themselves had no mitigating effect. In West 514's view, this procedure allowed the County to make a determination of nonsignificance before the full impact of the mall was understood.

The Washington Administrative Code describes when an MDNS is appropriate:

> The purpose of this section is to allow clarifications or changes to a proposal prior to making the threshold determination.
>
> (1) In making threshold determinations, an agency may consider mitigation measures that the agency or applicant will implement.
>
> . . .
>
> (3) . . . [I]f the lead agency specifies mitigation measures on an applicant's proposal that would allow it to issue a DNS, and the proposal is clarified, changed, or *conditioned* to include those measures, the lead agency shall issue a DNS.

(Italics ours.) WAC 197-11-350. When a governmental agency makes a negative threshold determination, it must show it considered environmental factors "in a manner sufficient to amount to prima facie compliance with the procedural requirements of SEPA." *Sisley v. San Juan Cy.*, 89 Wn.2d 78, 84, 569 P.2d 712 (1977) (quoting *Juanita Bay Vly. Comm'ty Ass'n v. Kirkland*, 9 Wn. App. 59, 73, 510 P.2d 1140 (1973)).

Here, the MDNS was issued only after the Planning Department adopted the pertinent parts of the 1978 EIS,

reviewed the environmental checklist submitted by Cafaro, and conditioned approval on development in conformance with the site plan "except as may be modified by the . . . studies" specified in the MDNS. In *Murden Cove Preserv. Ass'n v. Kitsap Cy.*, 41 Wn. App. 515, 525, 704 P.2d 1242 (1985), the court upheld approval of a project conditioned on completion of mitigation measures. *See also Hayden v. Port Townsend*, 93 Wn.2d 870, 880-81, 613 P.2d 1164 (1980), *overruled on other grounds in Save a Neighborhood Env't v. Seattle, supra* at 286 n.1. We agree with the Board that the Planning Department adequately considered environmental factors under SEPA before it issued the MDNS.

The Board's action in approving Cafaro's site development plan is affirmed.

GREEN and MUNSON, JJ., concur.

Review denied at 113 Wn.2d 1005 (1989).

Supreme Court, U.S.
FILED
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NO. 93-1978

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

LIBERTY LAKE INVESTMENTS, INC.

Petitioner,

v.

HARRY F. MAGNUSON, et al.

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S SUPPLEMENTAL BRIEF

Of Counsel:

Jerry R. Neal
Preston Gates & Ellis
SeaFirst Financial Ctr
Spokane, WA 99201-0636

Susan L. Guthrie
Culp, Guterson & Grader
One Union Square
Seattle, WA 98101-3143

EARLE J. HEREFORD, JR.
Culp, Guterson & Grader
27th Fl., One Union Sq.
600 University Street
Seattle, WA 98101-3143
(206) 624-7141

Counsel of Record and Attorney for Petitioner

aBCD Legal Printers, Seattle, Washington

September 8, 1994

31 pp

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ARGUMENT

Petitioner Liberty Lake Investments, Inc. ("LLII") submits this supplemental brief in support of its June 2, 1994, Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit (LLII's "Petition").[1] LLII's supplemental brief calls the Court's attention to a Ninth Circuit case not available when LLII requested certiorari three months ago. Sup. Ct. R. 15.7.

On July 26, 1994, the United States Court of Appeals for the Ninth Circuit filed its opinion in *USS-POSCO Industries and BE & K Construction Co. v. Contra Costa County Building and Construction Trades Council,* 1994-1 Trade Cas. (CCH) ¶ 70,647 (9th Cir. 1994) ("*POSCO*").[2] The rule followed by the Ninth Circuit panel in *POSCO* would have saved LLII's case from dismissal on summary judgment.

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[1]The petitioner is Liberty Lake Investments, Inc., and the respondents are Harry F. Magnuson, University City, Inc., Orville Barnes, Barnes Management and Development Co., Inc. (formerly McCarthy Management and Development Co., Inc.), Antone and Sundena Plese, Larry Lyden and West 514, Inc. Petitioner LLII, a Washington corporation, is wholly owned by William E. Boeing, Jr.; John and David Fluke; Luke G. Williams, Jr.; and Donald Sherwood. LLII is not associated, as parent or subsidiary, with any publicly traded or privately held corporation. Sup. Ct. R. 29.1.

[2]The text of the *POSCO* opinion appears as the Appendix to this supplemental brief.

In analyzing a *Noerr-Pennington*[3] defense raised in the case, the Ninth Circuit panel in *POSCO* confronted an antitrust claim of sham litigation involving not just one lawsuit, but rather multiple filings. As a result the Ninth Circuit was required to consider application of this Court's holdings in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 113 S. Ct. 1920 (1993) ("*PRE*") and in *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972) ("*California Motor Transport*"). The Ninth Circuit panel in *POSCO* determined that PRE alone did not provide the rule of decision for antitrust cases involving the filing of multiple sham suits.

The Ninth Circuit observed that the Supreme Court's opinion in *PRE* established a "strict two-step analysis to assess whether a single action constitutes sham petitioning." *POSCO*, 1994-1 Trade Cas. at 72,527. The Ninth Circuit panel did not apply the *PRE* two-step analysis to the case before it, because the case before it involved more than one legal proceeding. The panel instead followed the familiar rule from *California Motor Transport* to the effect that anticompetitive conduct involving the filing of multiple suits "with or without probable cause, and regardless of the merits of the cases" was sufficient to invoke the sham exception to *Noerr-Pennington*. *See California Motor Transport*, 404 U.S. at 512.

The *POSCO* panel explained its decision as follows:

> *California Motor Transport* . . . recognized that the filing of a whole series of lawsuits

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[3]*See Eastern R.R. Pres. Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, *reh. denied*, 365 U.S. 875 (1961); *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972).

> and other legal actions without regard to the merits has far more serious implications than filing a single action, and can serve as a very effective restraint on trade. When dealing with a series of lawsuits, the question is not whether any one of them has merit — some may turn out to, just as a matter of chance — but whether they are brought pursuant to a policy of starting legal proceedings without regard to the merits and for the purpose of injuring a market rival. The inquiry in such cases is prospective: Were the legal filings made, not out of a genuine interest in redressing grievances, but as part of a pattern or practice of successive filings undertaken essentially for purposes of harassment?

POSCO, 1994-1 Trade Cas. at 72,527. Put another way, the *POSCO* panel recognized that the pursuit of multiple anticompetitive lawsuits (regardless whether one or two lawsuits had merit) was not necessarily privileged under the First Amendment and that such conduct could raise a jury question whether the multiple lawsuits were instituted in order to cause injury through use of a "governmental process — as opposed to the outcome of that process — as an anticompetitive weapon." *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 380 (1991).

LLII's antitrust lawsuit against Harry Magnuson and the others was dismissed on authority of *PRE*. But the LLII litigation is not a "one-suit" case; rather, it addresses a pattern and practice, indulged in by Mr. Magnuson and the University City defendants, of using several putative environ-

mental lawsuits and other conduct, to block entry of new shopping center competition in the Spokane valley.[4]

To recapitulate briefly, Harry Magnuson and University City blocked the James S. Black and Co. Spokane valley mall project by funding, fostering and expanding *Riegel v. County of Spokane,* 31 Wn. App. 1038 (1982) into a three-year long suit that broke the Black project's back. Next, Magnuson and University City blocked R.A. Hanson's mall project by stirring up opposition to it over the years and funding a two-year lawsuit captioned *Crossman v. County of Spokane,* No. 86-2-01407-6 (filed April 24, 1986). Then, in the action which directly injured LLII, Magnuson initiated, funded and maintained, through straw-parties, the *West 514*[5] litigation which brought LLII's proposed Liberty Lake Mall to a grinding halt. These lawsuits were all non-meritorious. (*See generally* discussion in LLII's Petition at pages 12-16.)

The rule followed by the Ninth Circuit in *POSCO* is pertinent to this case even though not every lawsuit instituted by Mr. Magnuson and University City was directed at LLII. All the litigation was directed at excluding entry of new shopping center competition in the Spokane valley; all the litigation was without merit; but all the litigation was highly successful in preserving for an extended period of years Mr. Magnuson's and University City's hegemony in the Spokane valley, because the several lawsuits interfered with, delayed and stalled the efforts of every meaningful potential

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[4]The fact that the Liberty Lake suit involved a pattern and practice of misusing litigation to injure competition was argued by petitioner to both the District Court and to the Court of Appeals during proceedings below.

[5]*West 514, et al. v. County of Spokane,* No. 87-2-01106-7 (filed April 9, 1987), *aff'd on appeal,* 53 Wn. App. 838, 770 P.2d 1065, *rev. denied,* 113 Wn.2d 1005, 777 P.2d 1050 (1989).

entrant into the market. Because the antitrust laws protect competition, not competitors, the fact that Mr. Magnuson's and University City's multiple lawsuits were directed not only at LLII but also at others does not make this a "one-suit" case. (As Judge Posner noted, "Concern with the evidentiary problems may explain why some courts hold that a single lawsuit cannot provide a basis for an antitrust claim . . . an issue we need not face here since three improper lawsuits are alleged, and it can make no difference that they were not all against Grip-Pak." *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 694 F.2d 466, 472 (7th Cir. 1982), *cert. denied*, 461 U.S. 958 (1983).)

LLII's petition for certiorari raises important questions concerning the sham exception to *Noerr-Pennington* which the Court should settle. The opinion of the Ninth Circuit in *POSCO* clearly demonstrates not simply a conflict in the circuits, but rather that two panels of the same circuit court have differing views about the applicability of the rule in *PRE* to a pattern and practice case. The opinion in *POSCO* makes it even more important that this Court decide whether it was error to dismiss LLII's antitrust suit on summary judgment, when the litigation which injured LLII was one of three "environmental" lawsuits used by Mr. Magnuson and University City to preclude market entry of new shopping center competition in the Spokane valley. *See* LLII's Petition, Questions Presented No. 2 at (4), pages i-ii.

CONCLUSION

For the foregoing additional reasons, petitioner requests that a writ of certiorari be granted.

DATED: September 8, 1994.

Respectfully submitted,

Of Counsel:

Jerry R. Neal
Preston Gates & Ellis
SeaFirst Financial Center
Spokane, WA 99201-0636

Susan L. Guthrie
Culp, Guterson & Grader
One Union Square
Seattle, WA 98101-3143

EARLE J. HEREFORD, JR.
Culp, Guterson & Grader
27th Fl., One Union Sq.
600 University Street
Seattle, WA 98101-3143
(206) 624-7141

Counsel of Record and Attorney for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 92-15497

OPINION

USS-POSCO INDUSTRIES and
BE & K CONSTRUCTION CO.

Appellant,

v.

CONTRA COSTA COUNTY BUILDING &
CONSTRUCTION TRADES COUNCIL, AFL-CIO; et al.

Appellees.

Appeal from the United States District Court for the
Northern District of California
D. Lowell Jensen, District Judge, Presiding

Argued and Submitted
August 12, 1993

Filed July 26, 1994

Before: Alex Kozinski, David R. Thompson and
Thomas G. Nelson, United States Circuit Judges

OPINION

KOZINSKI, Circuit Judge:

We explore the nether reaches of two areas of antitrust law: the statutory labor exemption and the *Noerr-Pennington* doctrine.

I.

USS-POSCO Industries (UPI) is a joint venture between USX Corporation (formerly U.S. Steel) and Pohang Iron and Steel Co. of South Korea, formed to modernize and operate an old steel facility in Pittsburg, California (PITCAL). Interested unions allegedly attempted to coerce UPI into awarding the general contract to a unionized contractor. After bidding, UPI nevertheless awarded the $350 million construction contract — involving over 800 jobs — to appellant BE & K, a merit-shop contractor. *See* Henry Weinstein, *Workers Are Steeling Themselves to Fight Non-Union Upgrading of Pittsburg Plant, L.A. Times*, Mar. 16, 1987, at 3.

BE & K alleges the unions then began a campaign to eliminate non-union construction in Northern California by making an example of PITCAL. Although none of the unions had a collective bargaining agreement with BE & K, defendants allegedly filed automatic protests to BE & K's permits in order to cause it gratuitous expense and delay; lobbied for a local toxic waste disposal ordinance that would require BE & K to obtain more permits; sued to enforce the ordinance at the PITCAL site; encouraged BE & K's subcontractors to protest nonexistent safety violations; brought suit against BE & K for allegedly violating environmental laws (the Piledrivers suit); and brought numerous grievances, arbitrations and enforcement

proceedings against BE & K's partner, Eichleay Constructors, Inc. (the Eichleay actions). According to BE & K, the unions' purpose was not to organize BE & K's employees, but to cause such delay and expense that future project owners would only hire unionized contractors and subcontractors.

UPI and BE & K originally brought suit alleging unfair labor practices under the LMRA, and the unions defended on the ground that their lobbying efforts, the Piledrivers suit and the Eichleay actions were immunized from LMRA liability under the *Noerr-Pennington* doctrine. *See Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983) (applying *Noerr-Pennington* to labor context); *see also Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 144 (1961) (legitimate petitioning of government immunized from antitrust laws). Rejecting BE & K's argument that the suits fell within the sham exception to *Noerr-Pennington,* the district court found that the lobbying of state and local bodies and the Eichleay actions were valid attempts to petition the government. After discovery, the court granted partial summary judgment for the unions. ER 199.

BE & K filed an amended complaint which realleged the above-described conduct, this time claiming that it violated the Sherman and Clayton Antitrust Acts.[1] The court granted the unions' subsequent motion to dismiss on the ground that the amended complaint was foreclosed by the prior partial summary judgment. BE & K then filed its second amended complaint, basing it in part on the

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[1]UPI voluntarily dismissed its complaint against all defendants in February 1990, and is no longer a party to this suit. *See Firm, Building Trades, Settle Feud Over Environmental Concerns at Steel Plant*, Daily Lab. Rep. (BNA), Mar. 1, 1990, at A-8.

same activities the district court had ruled were protected by *Noerr-Pennington*. The court granted the unions' motion to strike those portions of the complaint dealing with the toxic waste ordinance, the Piledrivers suit and the Eichleay grievances. It also imposed Rule 11 sanctions on BE & K. ER 235 at 8-10.

The unions then advised the district court they intended to seek partial summary judgment on the antitrust claim on the ground that the surviving allegations involved activities protected by the statutory labor exemption. The court ruled that, in order to overcome the statutory exemption, BE & K would have to prove "both a combination with non-labor groups and an illegitimate purpose in such combination." ER 283 at 8 (emphasis added). The court then limited BE & K's discovery to the first of these elements. Because BE & K was unable to show a triable issue of fact as to whether there was a combination with non-labor groups, the court granted the unions' subsequent motion for partial summary judgment.

BE & K stipulated to dismissal of its remaining claims with prejudice. It appeals only the antitrust claims and the imposition of sanctions.

II.

In *United States v. Hutcheson*, 312 U.S. 219, 232 (1941), the Supreme Court examined the "interlacing" Sherman, Clayton and Norris-LaGuardia Acts, and held that they gave unions a statutory exemption to the antitrust laws:[2]

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[2]There is also a non-statutory exemption for agreements between unions and employers that are intimately related to the unions' vital concern with wages, hours and working conditions. *Connell Construc-*

> So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit . . . are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.

Hutcheson, 312 U.S. at 232 (emphasis added). This passage has been read as establishing a two-prong test for the statutory labor exemption: (1) Did the union combine with a non-labor group? (2) Did the union act in its legitimate self-interest? *See, e.g., United Mine Workers of America v. Pennington*, 381 U.S. 657, 662 (1965); *Allen Bradley Co. v. Local No. 3, IBEW*, 325 U.S. 797, 806-07 (1945); *Bodine Produce, Inc. v. United Farm Workers Org. Comm.*, 494 F.2d 541, 557-58 (9th Cir. 1974). A key question in this case is whether these two prongs of *Hutcheson* are to be read in the conjunctive (i.e., that plaintiff must establish both elements in order to get around the exemption), or in the disjunctive (i.e., that plaintiff can bypass the exemption by proving either element).

The district court read the *Hutcheson* test in the conjunctive and granted summary judgment on the antitrust claim because BE & K was unable to establish a triable issue of fact as to the first element — whether the unions had combined with non-labor groups. BE & K appeals this ruling, arguing first, that the district court defined non-

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tion Co. v. Plumbers & Steamfitters Local No. 100, 421 U.S. 616, 622 (1975); *Richards v. Nielsen Freight Lines*, 810 F.2d 898, 905 (9th Cir. 1987). As no such collective bargaining relationship existed here, the non-statutory exemption is not at issue.

labor group too narrowly; and second, that BE & K should have been allowed to show the union acted for an improper purpose, as an alternative avenue for defeating the statutory labor exemption.[3]

A.

What constitutes a non-labor group for purposes of the antitrust laws has never been very clearly defined.[4] It

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[3]BE & K also complains that the district court improperly assigned to it the burden of proving that the statutory labor exemption did not apply, since defendants normally bear the burden of proving exceptions to the antitrust laws. *See Feather v. UMWA*, 711 F.2d 530, 542 (3d Cir. 1983); *Consolidated Express, Inc. v. New York Shipping Ass'n*, 602 F.2d 494, 521 (3d Cir. 1979), *vacated on other grounds*, 448 U.S. 902 (1980); 9 Julian O. von Kalinowski, *Antitrust Laws and Trade Regulation*, § 81.09[2] (1993). But the statutory exemption is not an affirmative defense; it's an element of any claim that unions violated the antitrust laws. Plaintiff bears the burden of proof. *See Pennington*, 381 U.S. at 669 ("the alleged agreement between UMW and the large operators . . . , if proved, was not exempt from the antitrust laws"); *Richards*, 810 F.2d at 902 ("[f]ailure on the part of the plaintiff to produce evidence from which a jury could infer reasonably that conduct was conspiratorial, not unilateral, will lead to summary judgment for the defendant"); *Bodine Produce*, 494 F.2d at 561 (plaintiff must specifically allege non-labor group combination); *Mid-America Regional Bargaining Ass'n v. Will County Carpenters Dist. Council*, 675 F.2d 881, 886 (7th Cir. 1982) ("if the defendants' conduct is to fall outside the statutory exemption, the plaintiffs must allege a conspiracy under Allen Bradley"). *But see United States Steel Corp. v. Fraternal Ass'n of Steelhaulers*, 431 F.2d 1046, 1051 (3d Cir. 1970) (union failed to meet burden of proving element of statutory exemption).

[4]Indeed, the case law is saturated with confusing formulations. *See Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Ass'n*, 457 U.S. 702, 721 (1982) (labor group depends on "the presence of a job or wage competition or some other economic interrelationship affecting legitimate union interests") (*quoting American*

is possible, however, to derive a fair approximation of what the term means based on certain common-sense observations.

On the one hand, when a labor union combines with an entity that is competing in the plaintiff's market, this normally is deemed to be a combination with a nonlabor group, stripping the union of the statutory labor exemption. *But see* n. 5 *infra*. Thus, in most statutory labor exemption cases, the focus has been on whether the union combined with a competitor of the targeted employer. *See, e.g.*, *H.A. Artists*, 451 U.S. at 715 (discussing nonlabor group as "one or more employers"); *Federal Maritime Comm'n v. Pacific Maritime Ass'n*, 435 U.S. 40, 51 n. 15 (1978) (considering whether there is "combination with nonlabor groups, i.e., whether there is no conspiracy with management"); *Pennington*, 381 U.S. at 665-66 (union forfeited statutory exemption where it "agree[s] with one set of employers" to eliminate competition from the industry); *Allen Bradley*, 325 U.S. at 811 ("Congress evidently concluded . . . that the chief objective of Anti-trust legislation, preservation of business competition, could be accomplished by applying the legislation primarily only to those business groups which are

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Federation of Musicians v. Carroll, 391 U.S. 99, 106 (1968)); *H.A. Artists & Assocs. v. Actors' Equity Ass'n*, 451 U.S. 704, 717 (1981) ("nonlabor group" consists of "persons who are not 'parties to a labor dispute'" within the meaning of the Norris-LaGuardia Act) (*quoting Hutcheson*, 312 U.S. at 232); *Allen Bradley*, 325 U.S. at 798, 801, 809 (union lost statutory exemption where it combined with "employers and manufacturers of goods" to "aid and abet business men to do the precise things which the Act prohibits"; "when [a union participates] with a combination of business men who had complete power to eliminate all competition among themselves and to prevent all competition from others, a situation [is] created not included within the exemptions of the Clayton and Norris-LaGuardia Acts").

directly interested in destroying competition."); *Bodine*, 494 F.2d at 560 ("alliance between the defendant union and non-labor business groups engaged in competition with the plaintiffs" constituted combination with non-labor group); *see also* Phillip Areeda & Donald F. Turner, *Antitrust Law* ¶ 229e (1978).

At the other end of the spectrum, labor unions carrying out their normal functions must be free to hire law firms, contract for lease space and negotiate with other business entities, without risking antitrust liability. Even though many of the entities that unions deal with on a daily basis cannot fairly be described as labor groups, they are not deemed "non-labor groups" for purposes of the statutory labor exemption. Were it otherwise, this requirement — which lies at the heart of the test announced by *Hutcheson* — would be rendered utterly meaningless in the sense that everything unions do would become a combination with a non-labor group and possibly subject to antitrust liability.

To allow unions breathing space in carrying out their legitimate functions without giving them free rein to extend their substantial economic power into markets for goods and services other than labor, we conclude that the definition of non-labor group must not stray too far from the paradigm of the union combining with the employer's competitors. To constitute a non-labor group for purposes of the statutory labor exemption, therefore, the entity in question must operate in the same market as the plaintiff to a sufficient degree that it would be capable of committing an antitrust violation against the plaintiff, quite independent of the union's involvement. *See R.C. Dick Geothermal Corp. v. Thermogenics, Inc.*, 890 F.2d 139, 148 (9th Cir. 1989) (en banc) ("The requirement that the alleged [antitrust] injury be related to anticompetitive behavior

requires, as a corollary, that the injured party be a participant in the same market as the alleged malefactors.") (*quoting Bhan v. NME Hospitals, Inc.*, 772 F.2d 1467, 1470 (9th Cir. 1985)); *see also Associated Gen. Contractors v. California State Council of Carpenters*, 459 U.S. 519, 539 (1983); Areeda & Hovenkamp, *Antitrust Law* at 400 ¶ 334.1b (1993 Supp.).

As noted, a competitor of the plaintiff clearly falls within that definition, as would a supplier or purchaser of the plaintiff's goods or services. *See, e.g., E.W. French & Sons, Inc. v. General Portland, Inc.*, 885 F.2d 1392 (9th Cir. 1989) (ready-mix concrete supplier bringing antitrust suit against cement producer); *Zidell Explorations, Inc. v. Conval Int'l Ltd.*, 719 F.2d 1465 (9th Cir. 1983) (distributor of valves bringing antitrust action against suppliers). Other entities, though more remote, may nevertheless stand in such a relationship to the plaintiff that they are deemed to be operating in the same market. *See, e.g., Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988) (antitrust suit by manufacturer against private standard-setting organization); *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386 (9th Cir. 1992) (antitrust class action by title insurance consumers against insurers for participation in state-licensed rating bureaus). When the union combines with such an entity, it loses the protections of the antitrust exemption.[5]

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[5]There appears to be at least one exception to this general rule. In some cases, a party that would otherwise meet the definition of a "non-labor group" was considered a "labor group" because of an "economic interrelationship" between that party and the union. *See, e.g., Jacksonville Bulk Terminals*, 457 U.S. at 721 (status as "labor group" depends on "whether there is 'some . . . economic interrelationship affecting legitimate union interests'"); *Carroll*, 391 U.S. at 106 ("labor group" characterized by "job or wage competition or some other economic interrelationship affecting legitimate union interests between

BE & K took discovery on this issue and, although the initial order seemed to restrict discovery to BE & K's competitors, ER 283 at 14, the court subsequently explained that it did not mean to "cut off any discovery reasonably designed to identify contractors, manufacturers or other commercial entities with whom the defendants may have formed illegal combinations." IBEW SER 304 at 3. This was sufficiently broad to allow BE & K to identify anyone falling under the definition of non-labor group as explicated above, but BE & K has been able to point to no such entity. We therefore agree with the district court that BE & K has failed to raise a material issue of fact as to whether the unions combined with non-labor groups, and therefore did not carry its burden under this prong of the *Hutcheson* test.

B.

The district court didn't allow BE & K discovery on the alternate prong of *Hutcheson* because it took the view that failure as to one prong was fatal to BE & K's case. In its most recent pronouncement on the subject, however, the Supreme Court clearly held that a union that combines only with other labor groups may nonetheless lose the statutory exemption under the second prong of *Hutcheson*. *H.A. Artists & Assocs. v. Actors' Equity Ass'n*, 451 U.S. 704 (1981), involved a challenge under the Sherman Act to certain rules of the Actors' Equity Union, including the exaction of a franchising fee from theatrical agents licensed by the union.

The Supreme Court first inquired whether there was a combination between the union and any "non-labor

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the union members" and the purported "labor group"); *accord H.A. Artists*, 451 U.S. at 718.

groups," or persons who are not "parties to the labor dispute." *Id.* at 717. The Court found that the theatrical agents were not a "non-labor group" for purposes of the statutory exemption. *Id.* Had this been sufficient to establish the union's entitlement to the labor exemption, the Court could have stopped right there. Instead, it proceeded to evaluate whether the union's activities were undertaken in pursuit of its legitimate self-interest. While it found the union's activity generally exempt because the regulations were "clearly designed to promote the union's legitimate self-interest," *id.* at 721, it found "the fees that [the union] levie[d] upon the agents" might not be "a permissible component of the exempt regulatory system," *id.* at 722. Because no evidence had been presented at trial "to show that the costs justified the fees actually levied," *id.* at 712, the case was remanded for further factfinding.

Had the Court in *H.A. Artists* eventually approved all aspects of the arrangement between the union and the agents, its examination of the fee structure might have been explainable on a belt-and-suspenders rationale. But the Court found fault with the fee structure — or at least found that there might be fault. Since *H.A. Artists* was an antitrust case, the only possible fault could be a violation of the antitrust laws. We read this as a clear holding that a union may violate the antitrust laws — in other words, that it may lose the benefit of the labor exemption — even when it does not combine with a non-labor group. Although, prior to *H.A. Artists*, there was some doubt on this point,[6] there no longer is. *See* Daralyn J. Durie &

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[6]Some cases had suggested that the union must combine with a non-labor group as a predicate for antitrust liability. In *Allen Bradley*, 325 U.S. at 810, the Court explained that whether union activities violated the Sherman Act was "dependent upon whether the union acts

Mark A. Lemley, *The Antitrust Liability of Labor Unions for Anticompetitive Litigation*, 80 Cal. L. Rev. 757, 783 & n.155 (1992).

What, then, does it mean for a union to pursue an illegitimate purpose? In the broadest sense, everything a union does serves its self-interest. But *Hutcheson* requires that it act in pursuit of its legitimate self-interest. Whether the interest in question is legitimate depends on whether the ends to be achieved are among the traditional objectives of labor organizations. Thus, if a union forces employers to funnel money into a commercial enterprise from which the union derives profits; or if it forces the employer to hire the union president's spouse; or if a

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alone or in combination with business groups." *See, e.g., Hunt v. Crumboch*, 325 U.S. 821 (1945) (unilateral actions of union to drive petitioner out of business are immune from Sherman Act liability); *Embry-Riddle Aeronautical Univ. v. Ross Aviation, Inc.*, 504 F.2d 896, 903-04 (5th Cir. 1974) ("A Union can, without forfeiting the exemption, . . . act with a purpose to injure or even eliminate the business of an employer. . . . What makes the exemption disappear is sufficient proof of a concerted purpose, between the union and a favored employer.") (emphasis in original); *Bodine Produce*, 494 F.2d at 550 ("Following *Hutcheson*, the issue became primarily one of whether there existed an improper combination with non-labor groups."). Other cases had suggested that illegitimate purpose alone might bring a union outside the statutory exemption. *See, e.g., Jacksonville Bulk Terminals*, 457 U.S. at 714 ("the protections of [the statutory labor exemption] do not extend to labor organizations when they cease to act as labor groups or when they enter into illegal combinations with non-labor groups in restraint of trade") (emphasis added); *Allied Int'l, Inc. v. International Longshoremen's Ass'n*, 640 F.2d 1368, 1380 & n.12 (1st Cir. 1981) (although ILA didn't conspire with any non-union group, its boycott of Soviet cargo was not immunized by statutory exemption because it didn't relate to "legitimate union interest"), *aff'd*, 456 U.S. 212 (1982); *Bodine*, 494 F.2d at 558 (activities of non-labor group combination remain within statutory exemption because union was pursuing own interests).

union is involved in illegal activities unrelated to its mission, such as dealing drugs or gambling, those would not be objectives falling within the union's legitimate interest. In such cases, the unions "cease to act as labor groups." *Jacksonville Bulk Terminals*, 457 U.S. at 714.

Of course, the means employed by the union bear on the degree of scrutiny we will cast on the legitimacy of the union's interest. *See Local No. 189, Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co.*, 381 U.S. 676, 689-90 (1965) (plurality opinion) (restraints on the product market must be "so intimately related to wages, hours and working conditions that the unions' successful attempt to obtain that provision through bona fide, arm's length bargaining in pursuit of their own labor union policies, and not at the behest of or in combination with nonlabor groups, falls within the protection of the national labor policy and is therefore exempt from the Sherman Act"). Thus, where a union engages in activities normally associated with labor disputes, *see, e.g.*, 29 U.S.C. § 104,[7] these will be presumed to be in pursuit of the union's legitimate interest absent a very strong showing to the contrary. *See, e.g., Bodine Produce,* 494 F.2d at 557 (group boycott and demands for recognition were "intimately related to wages, hours, and working conditions which . . . places it within the protection of national labor policy and exempt from the Sherman Act"). Where the union's activities are farther afield, the scrutiny is more

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[7]Congress has provided special protection for certain traditional union activities in 29 U.S.C. § 104, which, *inter alia,* prohibits restraining orders or injunctions where persons involved in a labor dispute engage in work stoppage, publicize the existence or facts of their dispute, assemble or organize to promote their interest in the dispute, advise or notify persons of their intent to do any of these acts, or advise, urge, cause or induce without fraud or violence any of these acts.

searching. *See, e.g., H.A. Artists,* 451 U.S. at 722 (examining whether franchise fees are sufficiently related to legitimate union ends); *Carroll,* 391 U.S. at 112 ("the price-list requirement is brought within the labor exemption under the finding that the requirement is necessary to assure that scale wages will be paid to the sidemen and the leader").

H.A. Artists casts a highly instructive light on this issue. The activity there — collection of franchise fees from the agents for the direct benefit of union members — was not a traditional union activity; it looked like the union may have been using its bargaining power with theatrical agents to generate a collateral source of revenue. The Court did not say the franchise fees violated the antitrust laws per se, but placed a substantial burden on the union to prove why this method of collecting revenues was not merely convenient but necessary. "[W]ithout the fees . . .," the Court reasoned, "the dues of [the union's] members would perhaps have to be increased to offset the loss of a general revenue source," but there was "no reason to believe that any of its legitimate interests would be affected." 451 U.S. at 722. The Court's concern thus seemed to be that the union may have funneled the market power granted to it by the labor laws into a money-making enterprise. That the money would then be used to finance labor-related activities was not, in the Court's view, exculpatory, unless the union could show it could not achieve those objectives some other way.

Many of the activities of which BE & K complains are traditional organizational activities, closely related to traditional union ends. For example, the unions allegedly "picketed and handbilled the plaintiffs' premises" after BE & K refused to "recognize them as the exclusive collective bargaining representative for the employees of

BE & K and its subcontractors, and enter into a collective bargaining agreement with the defendants. . . ." SAC ¶¶ 31(e)(i),(iii). And the unions encouraged work stoppages by unionized employees because of well-founded safety concerns at the project site. *See Contra Costa SER* 3-5, 316-40; 348-52.[8]

That these activities were not undertaken to unionize this particular employer but in order to eliminate non-union shops altogether by making an example of BE & K does not matter. *See Pennington*, 381 U.S. at 666 ("a consequence of [legitimate] union activity may be to eliminate competition based on differences in [labor] standards"); *Bodine Produce*, 494 F.2d at 549 (unions' purpose is "to eliminate competition based on differences in labor standards"). Encouraging the use of unionized labor is an objective well within the legitimate interests of labor unions and, so long as this end is pursued by activities normally associated with labor disputes, there's a strong presumption that the unions are protected from antitrust liability by the statutory labor exemption.

More troublesome are certain other activities allegedly undertaken by the unions, such as pressing frivolous lawsuits, automatically protesting against permits sought by BE & K, pressing for the passage of a regulatory measure and then agitating for its enforcement against BE & K — all allegedly to make an example of BE & K and discourage use of merit shop contractors by parties such as UPI. Taking a cue from *H.A. Artists,* we cannot say that pursuing legitimate labor goals through this kind of activity is

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[8]BE & K also vaguely alleged that there were violent pickets. But violence alone is not sufficient to turn protected conduct like labor picketing into an antitrust violation. *See Apex Hosiery Co. v. Leader*, 310 U.S. 469, 513 (1940); *Bodine Produce*, 494 F.2d at 559.

per se exempted from the antitrust laws. *See Durie & Lemley*, 80 Cal. L. Rev. at 759-62 (using BE & K as case study). The question here, as in *H.A. Artists,* is whether the non-traditional means were appropriate — in other words, whether the non-traditional means were not only lawful, but necessary because the goals could not be achieved through traditional tactics. And the burden to show this lies with the unions. *See H.A. Artists*, 451 U.S. at 722.

Because the district court erroneously construed *Hutcheson*'s two-part test in the conjunctive, it did not allow discovery on this issue. In this, we conclude, the district court erred. Plaintiff was entitled to try to raise a triable issue of fact on this point by gathering evidence in support of its allegations.

III.

That's not the end of the matter, however, because the unions raise another defense. The *Noerr-Pennington* doctrine provides broad antitrust protection for those who "petition the government for a redress of grievances." *City of Columbia v. Omni Outdoor Advertising, Inc.*, 111 S. Ct. 1344, 1353 (1991) (*quoting* First Amendment). This protection extends to lobbying of government officials, *Noerr Motor Freight, Inc.*, 365 U.S. at 144, and petitioning of administrative agencies and courts, *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). In those contexts, immunity from antitrust liability is lost only if a party engages in "sham" petitioning.

BE & K argues that the unions engaged in a pattern of "automatic petitioning of governmental bodies . . . without regard to and regardless of the merits of said

petitions." SAC ¶ 27; *see also id.* at ¶ 32(a) (alleging that unions filed "a series of overlapping, repetitive and sham lawsuits against plaintiffs, their employees and attorneys . . . with or without probable cause and regardless of the merits of the claims asserted therein") (emphasis added); *id.* at ¶ 30(a) (describing published article by the Business Manager of the Contra Costa Building Trades Council describing a computer system through which "all permits for known non-union contractors would automatically be protested, regardless of size or amount of permit"). BE & K relies on *California Motor Transport Co. v. Trucking Unlimited,* where the Supreme Court held the allegations "that petitioners 'instituted the proceedings and actions . . . with or without probable cause, and regardless of the merits of the cases,'" 404 U.S. at 512, were "[o]n their face . . . within the 'sham' exception," *id.* at 516.

The unions counter that the Supreme Court's most recent pronouncement on the sham exception forecloses reliance on *California Motor Transport.* In *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus.*, 113 S. Ct. 1920, 1928 (1993), the Court set out a two-part test for sham litigation: First, the suit must be "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits"; second, the baseless lawsuit must conceal "'an attempt to interfere directly with the business relationships of a competitor.'" *Id.* at 1928 (*quoting Noerr,* 365 U.S. at 144) (emphasis in original). The two parts of the test operate in succession: Only if the suit is found to be objectively baseless does the court proceed to examine the litigant's subjective intent. *Id.*; *Liberty Lake Investments, Inc. v. Magnuson*, 12 F.3d 155 (9th Cir. 1993). Under this two-prong test, the unions argue, BE & K must show that each individual suit the unions brought was objectively baseless — a task it aban-

doned by phrasing the question on appeal as follows: "Whether litigation that is not objectively baseless can still constitute 'sham litigation' sufficient to eliminate . . . *Noerr-Pennington* immunity." BE & K Opening Br. at 1 (emphasis added).

We're not persuaded that *Professional Real Estate Investors* effectively overrules *California Motor Transport*. Far from criticizing or limiting *California Motor Transport*, the *Professional Real Estate Investors* majority cited it with approval. The Court acknowledged that the cases dealt with different questions and noted that "nothing in *California Motor Transport* retreated from the[ ] principle[ ]" that "unprotected activity [must] lack objective reasonableness . . . regardless of intent or purpose." 113 S. Ct. at 1926-27.

We reconcile these cases by reading them as applying to different situations. *Professional Real Estate Investors* provides a strict two-step analysis to assess whether a single action constitutes sham petitioning. This inquiry is essentially retrospective: If the suit turns out to have objective merit, the plaintiff can't proceed to inquire into subjective purposes, and the action is perforce not a sham. *See* 113 S. Ct. at 1928 & n.5.

California Motor Transport deals with the case where the defendant is accused of bringing a whole series of legal proceedings. Litigation is invariably costly, distracting and time-consuming; having to defend a whole series of such proceedings can inflict a crushing burden on a business. *California Motor Transport* thus recognized that the filing of a whole series of lawsuits and other legal actions without regard to the merits has far more serious implications than filing a single action, and can serve as a very effective restraint on trade. When dealing with a

series of lawsuits, the question is not whether any one of them has merit — some may turn out to, just as a matter of chance — but whether they are brought pursuant to a policy of starting legal proceedings without regard to the merits and for the purpose of injuring a market rival. The inquiry in such cases is prospective: Were the legal filings made, not out of genuine interest in redressing grievances, but as part of a pattern or practice of successive filings undertaken essentially for purposes of harassment?

The allegations in BE & K's complaint track the language of *California Motor Transport* and, if proven, would be sufficient to overcome the unions' *Noerr-Pennington* defense. The record, as developed to date, however, forecloses any possibility that BE & K could substantiate its claim. As noted, the fact that a small number in the series of lawsuits turn out not to be frivolous will not be fatal to a claim under *California Motor Transport;* even a broken clock is right twice a day. Here, however, fifteen of the twenty-nine lawsuits alleged by BE & K as part of the pattern of filings "without regard to the merits" have proven successful.[9] The fact that more than half of all the actions as to which we know the results turn out to have merit cannot be reconciled with the charge that the unions were filing lawsuits and other actions willy-nilly without regard to success. Given that the plaintiff has the burden in litigation, a batting average exceeding .500 cannot support BE & K's theory. BE & K therefore cannot sustain its burden of showing that the unions' conduct

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[9]The twenty-nine actions are listed in paragraph 32(b) of the Second Amended Complaint. BE & K lists separately seven suits in federal court and eight arbitration actions the unions filed against Eichleay Corporation. All were successful and ultimately enforced by the Third Circuit in *Eichleay Corp. v. International Assoc. of Bridge, Structural and Ornamental Iron Workers*, 944 F.2d 1067 (1991).

falls within the sham exception to the *Noerr-Pennington* doctrine.[10]

IV.

Finally, BE & K challenges the sanctions awarded against it by the district court because of its persistent reincorporation of stricken parts of the complaint in the amended complaints. The district court found that BE & K "clearly violated the Court's . . . Order by repleading causes of action for which summary judgment was granted for defendants." Order of 8/24/89 at 9. BE & K responds that its repleading was required by our decision in *London v. Coopers & Lybrand*, 644 F.2d 811, 814 (9th Cir. 1981), which held that "a plaintiff waives all causes of action alleged in the original complaint which are not alleged in the amended complaint." *Accord King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987).

BE & K's lawyers could find no case applying this rule where the amended complaint was filed after summary judgment rather than after a motion to dismiss. Nonetheless, they claim a good faith belief that they were required to replead the claims on which the court had granted summary judgment in order to preserve them for appeal.

We agree with the district court that the *London* rule only applies to amended complaints that follow upon dismissal with leave to amend, and not to those that follow summary judgment. Nonetheless, we have found no case drawing this distinction. Counsel were not required to risk

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[10]Before us, the unions have moved for sanctions on the ground that BE & K's continued prosecution of this issue after the Supreme Court decided *Professional Real Estate Investors* was frivolous. We obviously disagree.

forfeiting their client's right to appeal in order to avoid sanctions. BE & K's reading of *London* is not frivolous and, in the absence of authority on point, counsel's decision to err on the side of caution cannot be faulted.

We conclude that unions can forfeit the statutory labor exemption even without combining with non-labor groups if the union acts outside this legitimate self-interest. While most of the unions' activities alleged here were protected by the statutory labor exemption, the lawsuits, permit protests and lobbying activities allegedly designed to make an example of BE & K may not have been. The district court therefore erred by precluding discovery into whether these means were intimately related to legitimate union ends. Nonetheless, the error was harmless because these petitioning activities were protected from antitrust liability under the *Noerr-Pennington* doctrine. We also reverse the award of sanctions against BE & K.

AFFIRMED IN PART; REVERSED IN PART.